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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOS ANGELES JOINT BOARD, AMALGAMATED CLOTHING
WORKERS OF AMERICA, an unincorporated voluntary
association,

Plaintiff and Appellee,

vs.

GRUNWALD-MARX, INC.,

Defendant and Appellant.

On Appeal From Order and Judgment Granting Summary
Judgment and Denying Summary Judgment and Order
Directing Arbitration.

BRIEF FOR APPELLANT.

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FILED

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TOPICAL INDEX

	PAGE
Statement of the case.....	2
Statement of questions presented.....	5
I.	
The state court action is a bar to the instant case and the instant case should be dismissed.....	5
II.	
An arbitrator does not have jurisdiction to determine his own jurisdiction	14
Conclusion	17

TABLE OF AUTHORITIES CITED

CASES	PAGE
Evans v. Horton, 115 Cal. App. 2d 281.....	13
Goodall-Sanford, Inc. v. United Textile Workers, 353 U. S. 550, 1 L. Ed. 2d 1031.....	2
McCarroll v. L. A. County District Council of Carpenters, 49 Cal. 2d 45.....	15
Panos v. Great Western Packing Co., 21 Cal. 2d 636.....	13
Posner v. Grunwald-Marx, Inc., 56 A. C. 159.....	6
Ryan Aeronautical Co. v. International Union, 173 Cal. App. 2d 463.....	11
Shatte v. International Alliance, 182 F. 2d 158.....	7
United Steelworkers of America v. American Manufacturing Co., 363 U. S. 564.....	10, 12, 14, 16
United Steelworkers of America v. Enterprise Wheel & Car Corp., 373 U. S. 593.....	10, 12, 14, 16
United Steelworkers of America v. Warrior & Gulf Navi- gation Co., 363 U. S. 574.....	10, 12, 14, 16
Wulfjen v. Dolton, 24 Cal. 2d 891.....	9

STATUTES

Code of Civil Procedure, Sec. 1281.2	14
Labor-Management Relations Act, Sec. 301(a)	2, 15
United States Code Annotated, Title 29, Sec. 185	1, 2
United States Code Annotated, Title 29, Sec. 185(a).....	2
United States Code Annotated, Title 28, Sec. 1291.....	1

TEXTBOOKS

1 American Jurisprudence, p. 487.....	8
1 American Jurisprudence, p. 490.....	8
1 California Jurisprudence 2d, p. 704.....	9

No. 17502
IN THE
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LOS ANGELES JOINT BOARD, AMALGAMATED CLOTHING
WORKERS OF AMERICA, an unincorporated voluntary
association,

Plaintiff and Appellee,

vs.

GRUNWALD-MARX, INC.,

Defendant and Appellant.

On Appeal From Order and Judgment Granting Summary
Judgment and Denying Summary Judgment and Order
Directing Arbitration.

BRIEF FOR APPELLANT.

The United States District Court has jurisdiction by virtue of the authority of Section 185, Title 29 U. S. C. A., which authorizes suits for violation of contracts between an employer and a labor organization to be brought in any District Court of the United States having jurisdiction of the parties without regard to the citizenship of the parties.

This court has jurisdiction of this appeal by virtue of the authority of Section 1291, Title 28 U. S. C. A., which authorizes appeals from all final decisions of the District Courts of the United States.

An order directing arbitration pursuant to Section 185, Title 29 U. S. C. A. is a final decision and appealable. *Goodall-Sanford, Inc. v. United Textile Workers*, 353 U. S. 550, 1 L. Ed. 2d 1031.

The amended complaint alleges that suit is based on violation, and seeks performance, of a contract between a labor organization representing employees in an industry affecting interstate commerce, as defined in the Labor Management Relations Act of 1947, as amended, and an employer engaged in operations affecting interstate commerce within the meaning of said Act [Tr. p. 13]. The amended complaint alleges that the United States District Court has jurisdiction over the persons and subject matter under and pursuant to the provisions of Section 185(a), Title 29 U. S. C. A. [Tr. p. 13]. The trial court found the facts in the amended complaint relating to jurisdiction to be true [Tr. pp. 110-111].

Statement of the Case.

This is a suit for specific performance to compel arbitration under and pursuant to Section 301(a) of the Labor Management Relations Act, as amended (Sec. 185, Title 29 U. S. C. A.). The amended complaint alleges that plaintiff union and defendant company were parties to a collective bargaining agreement, which expired September 30, 1959; that Article 14 of the collective bargaining agreement provides for the settlement by arbitration of all complaints, grievances or disputes arising between the parties relating, directly or indirectly, to the provisions of the said agreement; that Article 15 of the said agreement prohibits strikes and work stoppages for any reason, or cause, whatsoever; that on May 29, 1957, defendant moved its manu-

facturing plant from Long Beach, California to Phoenix, Arizona; that, as a result thereof, a controversy arose in that plaintiff contends that defendant breached the said agreement by manufacturing its products in its Phoenix plant and did further breach the agreement by locking out its employees at the Long Beach plant; that said lockout has been continuous to September 30, 1959 in violation of Article 15 of the collective bargaining agreement; that defendant thereby has deprived employees of wages, holiday pay, vacation pay, and insurance contributions and caused plaintiff to lose membership dues and initiation fees; that the dispute has been taken up between representatives of plaintiff and defendant without agreement and that defendant refuses to arbitrate the matter pursuant to paragraph 14 of the collective bargaining agreement.

The prayer of the amended complaint is that defendant specifically be required to perform Article 14 of the collective bargaining agreement, particularly with respect to the dispute, as it is described in the amended complaint.

The defense of defendant is that prior to the filing of the instant action, plaintiff filed an action in the Los Angeles Superior Court to compel arbitration of the subject matter and claims set forth in the amended complaint; that trial of the issues was held in the Los Angeles Superior Court and an order denying plaintiff's petition to compel arbitration was granted; that the judgment was affirmed on appeal to the District Court of Appeal; that by virtue of the filing of the prior action in the State Court, plaintiff is barred from prosecuting this action in the Federal District Court under federal law and the instant action should be abated.

For a second defense, defendant alleged that plaintiff had made an election of remedies in filing the petition in the Los Angeles Superior Court for specific performance to compel arbitration of the same subject matter and claims and is be barred from prosecuting the instant action.

For a third defense, defendant alleged that by virtue of the prior State Court action, plaintiff is estopped from prosecuting the instant action.

For a fourth defense, defendant alleged that there has been an unreasonable delay of three and one-half years on the part of plaintiff in requesting arbitration of matters set forth in the amended complaint and plaintiff is estopped from now demanding arbitration of said matters.

For a fifth defense, defendant alleged that plaintiff has no legal capacity to demand or compel arbitration of wage claims for individual employees since claims for wages are a uniquely personal right to each individual employee, arising out of contracts of hire, which are separate and apart from the collective bargaining agreement.

Defendant prayed for judgment that plaintiff take nothing by its amended complaint.

Plaintiff and defendant both moved for summary judgment. The facts are not in dispute. The trial court granted plaintiff's motion for summary judgment and denied defendant's motion for summary judgment. The trial court ordered that within thirty days after entry of judgment, plaintiff and defendant proceed to arbitrate the controversies existing between them in accordance with the terms of the collective bargaining agreement.

Statement of Questions Presented.

Did the District Court err in finding that it is for an arbitrator, and not for the District Court, to determine the merits of the disputes between plaintiff and defendant, including any and all of the defenses raised by defendant in its amended answer?

I.

The State Court Action Is a Bar to the Instant Case and the Instant Case Should Be Dismissed.

In the State Court action filed by plaintiff to compel arbitration, the basis of the lawsuit is that because defendant closed its manufacturing plant in Long Beach and moved it to Phoenix, defendant owes its employees vacation pay and holiday pay. This is the basis of the instant action in the Federal Court. In the State Court action, plaintiff sought vacation pay pursuant to paragraph 9 of the collective bargaining agreement, and holiday pay pursuant to paragraph 11 of the collective bargaining agreement. In this action, among other things, plaintiff seeks vacation pay and holiday pay for the same employees pursuant to paragraphs 15 and 17 of the contract. The prayer of the State Court action was that the court issue an order directing arbitration to proceed as to the dispute over vacation and holiday pay for all persons on the payroll of the company prior to closing the plant in California. Plaintiff sought, in the State Court action, an interpretation of paragraph 9 and paragraph 11 of the contract to determine if employees were entitled to vacation and holiday pay. The Los Angeles Superior Court denied plaintiff's petition to compel arbitration and this judgment was affirmed by the District Court of Appeal. How-

ever, the California Supreme Court reversed the judgment in *Posner v. Grunwald-Marx, Inc.*, 56 A. C. 159, and ordered plaintiff and defendant to arbitrate the dispute over vacation and holiday pay.

Prior to the decision of the California Supreme Court and fearful that it might lose its right to arbitrate vacation and holiday pay, plaintiff filed this action in the Federal District Court in an attempt to recover, among other things, vacation and holiday pay, based on the same facts *but upon a different theory*, to wit, that vacation and holiday pay was owed employees by virtue of paragraphs 15 and 17 of the collective bargaining agreement. The original complaint on file herein covered the identical claims for damage set out in the State Court action, in addition to claims for vacation and holiday pay for 1958 and 1959, plus wages for the employees for three years and loss of dues to the union. Realizing the weakness of its position, plaintiff amended its complaint so as to take out of the amended complaint claims for damages for vacation pay in 1957 and holiday pay for Decoration Day in 1957.

It is defendant's position that where there is a breach of an entire and indivisible contract, there can arise but one cause of action and if in the action to enforce that cause of action, plaintiff does not demand the entire relief to which it is entitled, it cannot afterwards sue for the balance. Defendant submits that plaintiff has illegally split its cause of action and that the State Court action is a bar to this action and that this action should be dismissed as a result of the final determination of the State Court action by the California Supreme Court.

Plaintiff seeks to avoid this principal of law by asserting that the contract is divisible by its terms and may give rise to more than one cause of action. Plaintiff asserts that the breach of contract by defendant was a continuous one up to the expiration of the agreement on September 30, 1959, and that the federal action is to recover for breaches that occurred subsequent to the filing of the State Court action.

It should first be pointed out that the original petition was filed in the State Court on October 27, 1957, but that the third amended petition was not filed by plaintiff in the State Court until October 6, 1959. This was after the expiration of the collective bargaining agreement on September 30, 1959. Plaintiff could have put into its third amended petition in the State Court action all of the claims for damages which it now asserts in this action.

Apart from the foregoing, however, the law is clear that persons who are discharged in violation of a contract may sue only once and at that time recover all present and prospective damages. In *Shatte v. International Alliance*, 182 F. 2d 158, this court said at page 164:

“The complaint alleges that appellants were forced to leave their employment on or about September 23, 1946. Thus, whatever breach of contract is alleged took place at least nine months before the enactment of the statute [the Taft-Hartley Act]. Appellant stressed the allegations of the complaint that appellees have continuously maintained a ‘mass lockout’ against appellants down to the time of the complaint as establishing a ‘continuous breach’ extending until after the en-

actment of Section 301. The breach of contract alleged was total and absolute on or about September 23, 1946, and the cause of action, if any, for such breach accrued in its entirety at that time. *The general rule is that an employee who is discharged in violation of its contract of employment may sue only once and at that time recover all present and prospective damages.* (Citing authorities.) . . . The alleged continuous acts of barring appellants from employment subsequent to the enactment of Section 301 concededly might serve to enhance the damages for a breach of contract to which liability had already attached, but such acts could not in themselves constitute 'violation of contract' within the meaning of Section 301 because according to the complaint no contracts between appellants and appellee remained outstanding." (Emphasis added).

In 1 American Jurisprudence p. 487, it is said:

"For the breach of an entire and indivisible contract, there can arise but one cause of action, and if in the action to enforce that cause of action the plaintiff does not demand the entire relief to which he is entitled, he can not afterwards sue for the balance."

Again, at 1 American Jurisprudence 490, it is said:

"The rule supported by the great weight of authority is that after the discharge, as the employee performs no more services, *he is entitled no longer to wages as such*; he can not elect, according to the majority rule, to consider the contract as still in force to the extent of holding himself ready to perform, and bring successive actions for future

installments of wages provided for under the contract, based on the fiction of constructive service; his only cause of action is either one for damages for a breach of the contract of employment to recover damages both present and prospective, or one based on a rescission of the contract to recover the value of services actually rendered." (Emphasis added).

In 1 Cal. Jur. 2d p. 704, it is said:

"The rule against splitting a single cause of action applies to both contractual and delictual causes, and to actions against municipal corporations as well as against individuals. . . . Thus, an employee who is discharged in violation of his contract of employment may ordinarily sue only once, and at that time recover all present and prospective damages."

In *Wulfjen v. Dolton*, 24 Cal. 2d 891, the California Supreme Court holds that a party may not split up a single causes of action and make it the basis of separate suits and, if he does, the first action may be pleaded in abatement of any subsequent suit on the same claim. The Supreme Court said that the rule against splitting a cause of action is based on two reasons: (1) the defendant should be protected against vexacious litigation and (2) it is against public policy to permit litigants to consume the court's time by relitigating matters already judicially determined or by asserting claims which properly should be settled in some prior action. The Supreme Court concluded by holding that the violation of one primary right constitutes a single cause of action though it may entitle the injured party to many forms of relief and the relief is not to be con-

founded with the cause of action, one not being determinative of the other.

The trial court stated in its opinion and order: "The defendant's contention that the union 'is splitting its cause of action' important in traditional concepts of contract law, is invalid in the federal law of arbitrability of labor disputes." The trial court cites no authority for this statement. Certainly, the reasons given by the California Supreme Court for the rule against splitting a cause of action is just as applicable to this situation as to the splitting of any other cause of action. The relationship between plaintiff and defendant has been terminated since May, 1957, and the reasoning of the United States Supreme Court (based on a continuing relationship between the employer and the union) in *United Steelworkers of America v. American Manufacturing Co.*, 363 U. S. 564, *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 373 U. S. 593, has no application to this case.

There is no question but what plaintiff could have demanded arbitration of asserted breaches of contract because of the closing of defendant's plant, and claimed all damages arising therefrom, at the time the plant closed on May, 1957. All of the *damage* which plaintiff claims in this action should have been included in the State Court action. The reason that the claims were not asserted in the State Court action is that they are obviously frivolous. Plaintiff contends that defendant has violated Section 17 of the collective bargaining agreement, which provides:

"During the term of this agreement, the company shall not without the consent of the union,

directly or indirectly, manufacture garments or cause them to be manufactured in any other factory other than its own factories, unless its employees in its own factories are first supplied with work.” [Tr. p. 29].

The uncontradicted affidavit of Grunwald states that defendant has never, directly or indirectly, manufactured garments or caused them to be manufactured in any factory other than its own factories, unless its employees in its own factories were first supplied with work [Tr. p. 103]. The claim of plaintiff is frivolous in that plaintiff is complaining about the manufacture of defendant’s garments in its own Phoenix, Arizona plant, which is clearly permitted by virtue of paragraph 17 of the agreement. Plaintiff only became brave enough to file an actin of this type three and one-half years after the closing of defendant’s plant because of the decision of the United States Supreme Court in the *United Steelworkers* case, *supra*, in which the Supreme Court said that “even frivolous claims should be arbitrated because of their therapeutic value.”

The claim that defendant violated paragraph 15 of the collective bargaining agreement by maintaining a lockout is equally frivolous. In *Ryan Aeronautical Co. v. International Union*, 173 Cal. App. 2d 463, 466, 467, “lockout” is defined as “to withhold employment from (a body of employees) as a means of bringing them to accept the employer’s terms (citing cases).” A lockout contemplates a continuing employment relationship between employer and employee. In the instant case, the employees were permanently terminated by the last week of May, 1957. None of the employees was ever re-employed and the Long Beach plant was closed permanently [Tr. p. 98]. Here again, is a

completely frivolous claim buttressed only by language of the Supreme Court in the *United Steelworkers* cases, *supra*, language which only has meaning where there is to be a continuous relationship between employer and union.

Defendant is entitled to protection against vexacious litigation as much as any other citizen. If plaintiff is free to split one cause of action into numerous individual claims, defendant will never see the end of it. Under the reasoning of the trial court, plaintiff can demand arbitration for vacation pay for 1957, 1958 and 1959 in separate actions. Plaintiff can demand arbitration of claims for each of more than 200 former employees for each separate year in separate actions and this could go on and on covering holiday pay, wages, insurance contributions and the like for each employee for each year. More than that, according to plaintiff's theory, adopted by the trial court, plaintiff is free to demand arbitration of a dispute involving vacation pay for each separate year for each employee not simply under the theory of Section 9 of the collective bargaining agreement but separate action could be brought based on Sections 15 and 17 of the collective bargaining agreement to recover vacation pay.

Plaintiff says that defendant must refuse to arbitrate each separate item of damage flowing from the primary breach, which was the termination of the employees' employment by virtue of the closing of defendant's plant in May of 1957. We respectfully submit that this statement is contrary to law. In *Panos v.*

Great Western Packing Co., 21 Cal. 2d 636, the California Supreme Court states that a judgment on the merits operating by way of bar against a second cause of action on the same cause of action concludes not only every matter which was, but every matter which might be, urged in support of the claim. Accord, *Evans v. Horton*, 115 Cal. App. 2d 281. A party to a collective bargaining agreement is not entitled to split a demand to arbitrate one primary right into two causes of action any more than a party can do so in any other situation. A demand to arbitrate can not be looked at in a vacuum. We must look at what it is that the union wants to arbitrate. The union wants to arbitrate in the federal action the same primary breach (if there was a breach) which is the subject of the State action. The factual basis of both is identical. The only difference between the two actions is that plaintiff is seeking damages in the federal action under different theories and different provisions of the collective bargaining agreement. The basic issue before the arbitrator in the State Court proceeding is whether or not the company breached the contract by closing its plant and terminating its employees in May, 1957. This is the same issue which would be presented to an arbitrator in the instant action. The only difference would be in the remedy. We have previously pointed out, however, that the relief sought is not to be confused with the basic cause of action and one is not determinative of the other.

II.

An Arbitrator Does Not Have Jurisdiction to Determine His Own Jurisdiction.

It is true, as pointed out by the trial court, that the United States Supreme Court in *United Steelworkers* cases, *supra*, has limited the scope of inquiry of the Federal District Court on a petition to compel arbitration. What the United States Supreme Court was talking about, however, was questions of contract of interpretation. The Supreme Court said that the trial court's function is to ascertain whether the party seeking arbitration is making a claim which on its face is governed by the contract. The Supreme Court was talking about the merits of a controversy. The court stated that arbitration should be ordered, even though the claim lacks merit if the claim on its face is governed by the contract. This situation is different. It involves procedural matters. Waiver of the right to arbitrate has been raised as a defense, as has estoppel and election of remedies. Waiver, abatement of the action, and splitting of causes of action are matters with which a lay arbitrator is wholly unfamiliar. These are matters which have traditionally been the prerogative of the court. The trial court holds that it is for the arbitrator to determine whether plaintiff has split its cause of action, whether there has been a waiver of the rights to arbitrate, and the extent to which the State Court action precludes the arbitration which is the outgrowth of this action. The recently enacted California arbitration statute provides, by comparison, that the trial court shall determine whether or not the right to compel arbitration has been waived by the petitioner before an order to arbitrate shall issue. Section 1281.2 California Code of Civil Procedure. It has long been

the law that an arbitrator does not have jurisdiction to determine his own jurisdiction unless such right is expressly given in the collective bargaining agreement. In *McCarroll v. L. A. County District Council of Carpenters*, 49 Cal. 2d 45, the California Supreme Court states that it is outside the usual understanding of the relations of court and arbiter, and their respective functions, to assume that the parties to a contract intended to leave an arbitrator the question of arbitrability. The California Supreme Court said that the court can not avoid the necessity of making a threshold determination of arbitrability, namely, whether the parties have, in fact, conferred such a power on the arbiter. *McCarroll v. L. A. County District Council*, *supra*, 49 Cal. 2d 45, 65, 66. We submit, therefore, that it is error for the trial court to refuse to determine procedural issues which traditionally it has been the function of the court to determine before ordering arbitration. We submit that it was error for the trial court to hold that the question of arbitrability is for the arbitrator to decide, without making a preliminary finding that the parties, by the collective bargaining agreement, intended that the question of arbitrability should be decided by the arbitrator. No such finding was made in this case, and none should be made based on the language of the collective bargaining agreement.

Section 301(a) of the Labor Management Relations Act, as amended, provides that “suits for *violation* of the contracts between an employer and a labor organization . . . may be brought in any district court of the United States. . . .” (Emphasis added.) How can it be said that defendant is in violation of the collective bargaining agreement if, in fact, by conduct, or other-

wise, plaintiff has waived its right to arbitrate or has made an election of remedies, which would preclude the instant action?

Section 15 of the collective bargaining agreement provides:

“The consideration of stoppage and lockout cases shall have precedent over, or shall be considered simultaneously with, complaints or grievances.”
[Tr. p. 55.]

Here is a complete violation of the terms of the collective bargaining agreement by *plaintiff*. By the terms of the contract, a lockout complaint must be considered at least simultaneously with the grievances and complaints set forth in the original State Court action. Can it be said that defendant is in violation of the contract in refusing to arbitrate a lockout case when the collective bargaining agreement requires that it be filed simultaneously with complaints set forth in the State Court action?

It is defendant's contention, that the trial court erred in finding that procedural matters relating to waiver, estoppel, election of remedies, splitting of causes of action and pleas in abatement are matters for the arbitrator to determine. These issues traditionally have been determined by the courts, and the United States Supreme Court has not held otherwise in the *United Steelworkers* cases, *supra*.

Conclusion.

It is respectfully submitted that plaintiff has split its cause of action to arbitrate and that the federal action was filed to recover damages arising out of the same basic primary right that is the subject matter of the State action under a different theory and different provision of the contract. This is prohibited by case law. Where employees are discharged in breach of a contract of employment, the cause of action is entire and accrues at the time of discharge. At that time suit must be brought to recover all damages, both present and prospective, and a second suit based on the same breach to recover damages under a different theory is prohibited. Further, the trial court erred in finding that an arbitrator has jurisdiction to determine his own jurisdiction. It is the contention of defendants that the question of arbitrability of a dispute, which involves procedural matters such as waiver, estoppel, plea in abatement and the like, are matters which must preliminarily be determined by the court before ordering arbitration.

Respectfully submitted,

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No. 17502

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GRUNWALD-MARX, INC.,

Appellant,

vs.

LOS ANGELES JOINT BOARD, AMALGAMATED CLOTHING
WORKERS OF AMERICA, an unincorporated voluntary
association,

Appellee.

APPELLEE'S REPLY BRIEF.

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TOPICAL INDEX

	PAGE
Statement of case.....	1
Question presented.....	2
Argument	3
Summary of argument.....	3
I.	
The nature and scope of the instant action and the law to be applied thereto compel an order directing appellant to arbitrate the matters in dispute between it and the appellee	5
II.	
Appellee seeks to arbitrate claims which on their face are governed by the agreement, and appellant has refused to perform that agreement.....	7
III.	
Appellant's defenses to this action are without merit, as they are based on a misconception of the nature of the cause of action herein.....	15
A. In this action to remedy a specific breach of the agreement to arbitrate, other lawsuits to remedy other breaches of this agreement cannot give rise to a defense of splitting of a cause of action.....	15
B. Appellant's asserted defenses of res judicata, collateral estoppel, waiver and laches, cannot bar this action and, if anything, serve to support the judgment of the court below.....	19
Conclusion	23

TABLE OF AUTHORITIES CITED

CASES	PAGE
Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348 U. S. 437.....	18
Cromwell v. County of Sac., 94 U. S. 681.....	20, 21
General Fire and Rubber Co. v. Local No. 512, United Rubber Workers, 294 F. 2d 957, 49 L. R. R. M. 2004, aff'g 191 Fed. Supp. 911, 49 L. R. R. M. 2001.....	9
Goodall-Sanford, Inc. v. United Textile Workers of America, 353 U. S. 550.....	5, 6, 17
International Association of Machinists v. Hayes Corp., F. 2d, 49 L. R. R. M. 2210.....	23
Item Company v. New Orleans Newspaper Guild, 256 F. 2d 855, cert. den. 358 U. S. 867.....	6, 16, 17
Jerome Posner, as Manager of Los Angeles Joint Board, Amalgamated Clothing Workers of America v. Grunwald-Marx, Inc., 56 A. C. 159, 363 P. 2d 313.....	19, 20, 21, 22
R. F. C. v. Harrisons & Grosfield, Ltd., 204 F. 2d 366, cert. den. 346 U. S. 854.....	6, 7, 16, 17, 23
Shatte v. International Alliance, 182 F. 2d 158.....	17
Sidele Fashions, 133 N. L. R. B. No. 49.....	14
Textile Workers v. Lincoln Mills of Alabama, 353 U. S. 448....	5, 6
United Steelworkers v. Warrior & Gulf Nav. Co., 363 U. S. 574	4, 6, 13, 14
United Steel Workers v. American Mfg. Co., 363 U. S. 564..	6, 7, 10, 13, 14, 18, 22

STATUTES

Labor-Management Relations Act of 1947, Sec. 301.....	18
Labor-Management Relations Act of 1947, Sec. 301(a)	5, 15
61 Statutes at Large, p. 136.....	5
United States Code, Title 29, Sec. 185.....	5

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IN THE
United States Court of Appeals
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GRUNWALD-MARX, INC.,

Appellant,

vs.

LOS ANGELES JOINT BOARD, AMALGAMATED CLOTHING
WORKERS OF AMERICA, an unincorporated voluntary
association,

Appellee.

APPELLEE'S REPLY BRIEF.

Statement of Case.

The Appellee herein, the Los Angeles Joint Board, Amalgamated Clothing Workers of America, AFL-CIO, is a labor organization representing employees in an industry affecting interstate commerce as defined in the Labor Management Relations Act of 1947, as amended. The Appellant, Grunwald-Marx, Inc., is an Employer engaged in operations affecting interstate commerce within the meaning of said Act [Tr. 13] and was a party to a collective bargaining agreement with Appellee [Tr. 19, *et seq.*].

The amended complaint herein seeks to compel the Appellant specifically to perform its agreement with the Appellee to submit to arbitration all grievances, complaints or disputes arising between them which relate directly or indirectly to the provisions of their collective bargaining agreement [Article 14, Tr. 27].

The sole remedy sought by the Appellee, granted by the Court below, is to compel the Appellant to proceed to arbitration concerning those grievances raised by the Appellee. These grievances are based upon Articles 15 [Tr. 28] and 17 [Tr. 29] of the Agreement, in that Appellant by closing its plants in Los Angeles and Long Beach, California, and moving them to Phoenix, Arizona, violated these provisions. While it is true that Appellee had previously filed an action in the Los Angeles Superior Court, subsequently upheld by the California Supreme Court, to compel arbitration of certain other grievances, namely the failure to pay vacation and holiday pay in 1957, under Articles 9 and 11 of said agreement the merits of those grievances are in no way involved in the instant action.

Other than has been noted Appellee is in general agreement with the Statement of Jurisdiction and Statement of the Case as contained in Appellant's brief.

Question Presented.

1. Did the District Court correctly decide that the Federal substantive law of arbitration requires that a party signatory to a collective bargaining agreement providing for the arbitration of all disputes relating to the provisions of the agreement must proceed to arbitration and present all arguments on the merits and alleged defenses to such disputes to the arbitrator?

ARGUMENT.

Summary of Argument.

In seeking to deny to Appellee its contractual right to have arbitration of disputes and grievances which exist between the parties, Appellant completely misconstrues the nature of this action. As a result of this failure to comprehend the purpose, scope and effect of the instant proceeding, Appellant cites decisions of this and other courts, the facts and holdings of which are totally unrelated to the case at bar.

This action is simply and solely one to compel specific performance of the agreement between the parties to submit to arbitration all complaints, grievances or disputes arising between them which relate directly or indirectly to the provisions of a collective bargaining agreement.

The collective bargaining agreement involved herein imposed upon Appellant the obligation to manufacture garments only in its own factories covered by the said agreement unless and until the employees in such factories were first supplied with work [Article 17, Tr. 56]; the obligation not to lock out these employees [Article 15, Tr. 55]; and the obligation to arbitrate grievances, complaints and disputes relating thereto which could not otherwise be settled with Appellee [Article 14, Tr. 54-55].

Appellee contends that Appellant has manufactured garments in plants other than its own, as defined by the collective agreement, without first supplying work to its employees covered thereby, all in violation of Article 17 thereof. Appellant says that it has not done so and seeks to sustain this position upon its own interpretation of the substantive provisions of the contract. Appellee

further contends that Appellant by closing its Long Beach and Los Angeles, California, factories and moving its manufacturing operations to Phoenix, Arizona, has locked out its employees in violation of the terms of the collective bargaining agreement. Appellant also denies this contention. Thus, there exist grievances and disputes between the parties arising under the collective bargaining argument which cannot be settled short of arbitration. Appellee then called upon Appellant to fulfill its obligation to resolve these grievances and disputes by the method provided in the collective bargaining agreement, namely, arbitration. This Appellant refused to do. It is for this last act by Appellant, the refusal to proceed to arbitration, and none other that Appellee sought relief from the court below. All questions relating to the merits of these disputes are not relevant to this action.

Questions relating to loss of wages, including fringe benefit income to the employees or loss of dues income to the union as a result of the claimed breach by the Appellant of Articles 15 and 17 of the Agreement are merely measures of damages which may or may not be levied by the arbitrator, after he and he alone, has determined the merits of these grievances. This Court is called upon by Federal substantive law, to determine but two issues in this action:

1. Can it be said "with positive assurance" that the parties *have not* contracted to submit to the arbitrator the questions of contract interpretation and violation sought to be arbitrated?¹

2. Has the Appellant refused to proceed to arbitrate such issues?

¹*United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U. S. 574, 582-583 (1960).

We submit that this Court must find in the negative on the first issue and in the affirmative on second issue, and must therefore sustain the judgment of the District Court.

I.

The Nature and Scope of the Instant Action and the Law to Be Applied Thereto Compel an Order Directing Appellant to Arbitrate the Matters in Dispute Between It and the Appellee.

This is an action brought by Appellee, a trade union representing workers employed in a business affecting interstate commerce, to compel arbitration pursuant to a collective bargaining agreement between that union and Appellant, the employer. This action was brought under the provisions of Section 301(a) of the Labor-Management Relations Act of 1947. 61 Stat. 136, 29 U. S. C. 185. The Supreme Court of the United States and the U. S. Courts of Appeal have not only clarified the nature and scope, as well as the relief which can be granted in such an action, but have defined and limited the function of the courts in such a proceeding.

In an action such as this, a plaintiff can obtain but one remedy to cure a violation of an undertaking to arbitrate grievances or disputes arising under a collective agreement, and that is specific performance of that undertaking. *Textile Workers v. Lincoln Mills of Alabama*, 353 U. S. 448. As the Supreme Court said in *Goodall-Sanford, Inc. v. United Textile Workers of America*, 353 U. S. 550, 551 in considering the nature of an action to compel arbitration:

“The right enforced here . . . is not merely a

step in judicial enforcement of a claim nor auxiliary to a main proceeding, *but the full relief sought.*" (Emphasis supplied).

In these circumstances, where a party to a collective bargaining agreement brings an action to remedy a breach of the agreement to arbitrate, the court may only examine the alleged breach of the contract to arbitrate, and no other. *United Steel Workers v. American Mfg. Co.* 363 U. S. 564; *United Steelworkers v. Warrior & Gulf Nav. Co.*, *supra*.

The instant cause of action accrued upon the refusal of the Appellant to proceed to arbitration. *R. F. C. v. Harrisons & Grosfield, Ltd.* (C. A. 2, 1953), 204 F. 2d 366, Cert. denied 346 U. S. 854. It, therefore, only required a judicial determination by the court below that the contractual obligation to arbitrate existed. As such the decree of the court below ordering enforcement of the arbitration provision in the collective bargaining agreement is correct and must be sustained. *Goodall-Sanford*, *supra*; *Item Company v. New Orleans Newspaper Guild* (C. A. 5, 1958), 256 F. 2d 855, cert. denied 358 U. S. 867. This is the sole thrust of this action.

In reaching its decision upon the Appellee's claim of an unjustified refusal by Appellant to comply with a demand for arbitration, the court below applied the federal substantive law of arbitration demanded by the U. S. Supreme Court in *Lincoln Mills*, *supra*. This federal substantive law has limited the function of a Federal Court in a proceeding such as this to the determination of the following issues, and the following issues alone:

1. Can it be said “with positive assurance” that the parties *have not* contracted to submit to the arbitrator the questions of contract interpretation and violation sought to be arbitrated?

2. Has the Appellant refused to proceed to arbitrate such issues?

The United States Supreme Court has held that courts “have no business weighing the merits of the grievance.”

So too in its adjudication of these issues, this Court must avoid any consideration or determination of the merits of the claims upon which arbitration is sought, *United Steelworkers v. American Mfg. Co.*, *supra*, and must defer to the arbitrator any defenses which might be proffered in avoidance or mitigation of the merits of those controversies, *R. F. C. v. Harrisons & Grosfield*, *supra*.

II.

Appellee Seeks to Arbitrate Claims Which on Their Face Are Governed by the Agreement, and Appellant Has Refused to Perform That Agreement.

Appellant - manufacturer - and Appellee - trade union - are not legal strangers, having maintained a contractual relationship for many years. In fact, the last complete collective agreement between the parties had been negotiated for a three year term in 1953 [Tr. 19, 31], which Agreement, with but slight modification not germane to the instant proceeding, had been extended for an additional three year term ending September 30, 1959 [Tr. 32-33].

In bringing this action to compel specific performance of the agreement to arbitrate, Appellee set out two matters in dispute between the parties, both arising by virtue of Appellant's breach of specific terms of that collective bargaining agreement. The grievances as stated in the amended complaint, in essence are:

(a) Since on or about April 10, 1957, and continuously thereafter, up to and including September 30, 1959 (the expiration date of the collective bargaining agreement), the Appellant manufactured and caused to be manufactured garments in violation of Article 17 of the collective bargaining agreement;

(b) On or about May 29, 1957 Appellant did lock out its employees covered by the terms of the collective bargaining agreement at its plants located in Long Beach and Los Angeles, Calif. and did continuously thereafter, up to and including September 30, 1959 maintain said lockout, in violation of Article 15 of the agreement.

The agreement to arbitrate is broad in scope and is neither restricted by any time limitations nor procedural requirements as to the form or manner in which complaints or disputes requiring arbitration are to be processed. It provides as follows [Article 14, Tr. 27-28]:

“All complaint, (sic) grievance or dispute arising between the parties relating directly or indirectly to the provisions of this agreement whether concerning discharges or any other terms thereof shall in the first instance be taken up for adjustment by a representative of the Union and a representative of the Company. In the event that they are unable to adjust the same, then such matters shall be submitted to arbitration. . . .”

Thus, at all times during which the breaches which Appellee seeks to arbitrate occurred there was in effect an agreement between the parties imposing upon them an obligation to arbitrate those matters in dispute between them arising from the terms of that Agreement which they could not resolve otherwise. The matters in dispute herein are clearly embraced by that obligation to arbitrate. Faced with the impossibility of resolving disputes with Appellant relating to the terms of the agreement by means other than arbitration, Appellee demanded that the existing disputes which had arisen by virtue of Appellant's acts during the term of the agreement be submitted to arbitration. This demand for arbitration was made September 30, 1960 [Tr. 92-93]. By letter of its attorney dated October 13, 1960, Appellant refused to arbitrate the matters set forth in Appellee's demand [Tr. 94]. Since the Appellee's right to arbitrate is not limited to demands for arbitration made during the life of the contract, the obligation to arbitrate has in no way been extinguished. *General Tire and Rubber Co. v. Local No. 512, United Rubber Workers* (C. A. 1, 1961), 294 F. 2d 957, 49 L. R. R. M. 2004, affg. (D. R. I.-1961) 191 Fed. Supp. 911, 49 L. R. R. M. 2001.

In its effort to obfuscate the true nature of Appellee's claim for relief in the instant proceeding, namely a judicial remedy for Appellant's refusal to abide by its obligation to arbitrate and no more, Appellant has raised asserted defenses to the merits of the disputes set forth in III, *infra*, which do not bear on the cause of action herein. Further, Appellant would have this Court reverse the court below on its specious assertion that the claims are "frivolous". This reliance by Appellant on an attack upon the merits of

the grievances merely demonstrates its misconception of the nature of this action and the function of this Court. Appellant is apparently unaware that it is threshing about in the dark ages of Federal arbitration law for, as the U. S. Supreme Court has said:

“The collective agreement calls for the submission of grievances in the categories which it describes, irrespective of whether a court may deem them to be meritorious.

* * *

“The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those the court will deem meritorious. The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware.” *United Steelworkers v. American Mfg. Co.*, 363 U. S. 564, 567-568.

In thus raising as a defense to this action the merits of grievances which Appellee seeks to arbitrate not only does Appellant raise matters which are extraneous to the case at bar, but matters which upon even casual examination explode in Appellant's face.

The first of Appellee's two grievances arises from Appellant's manufacture of garments in its wholly owned plant in Phoenix, Arizona. The collective agreement provides, *inter alia*, in Article 17 [Tr. 29]:

“Other Factories: During the term of this Agreement the Company shall not, without the

consent of the Union, directly or indirectly manufacture garments or cause them to be manufactured in any factory other than its own factories unless its employees in its own factories are first supplied with work.”

The facts as to this grievance are not in dispute. At the time the parties entered into the collective agreement, Appellant had but two factories, those in Long Beach and Los Angeles, California. By letter dated November 21, 1956 signed by its president, Appellant limited the coverage of the collective bargaining agreement to the employees in those two factories [Tr. 34]. After Appellant closed its factories in Long Beach and Los Angeles it continued to manufacture garments, but in a third factory located in Phoenix, Arizona, a factory specifically excluded from the coverage of the contract between the parties by virtue of Appellant’s letter of November 21, 1956. Appellant not only admits that it owns and operates the Phoenix factory [Tr. 35, par. I] but relies upon such ownership in defense of Appellee’s assertion that the manufacture of garments at that factory constitutes a violation of Article 17 in the face of the shutdown of the two plants admittedly covered by the collective agreement.

Thus, the nexus of this dispute lies in the interpretation of Article 17 of the collective agreement and the application of the proper interpretation of that clause to the facts.

Since this grievance directly or indirectly involves an interpretation of the terms of the agreement and the application of the facts thereto, it clearly falls within the scope of Article 14 thereof which states that “All . . . grievance[s] . . . relating directly or indirectly to

the provisions of this agreement . . . shall be submitted to arbitration [Tr. 27].

The second grievance asserted by Appellee also may be resolved only by interpretation of a contract clause. Article 15 of the collective agreement provides:

“Strikes and Lockouts: During the period of this Agreement there shall be no general lockout, general strike, individual shop strike, shop or union meetings called during working hours, or shop stoppage for any reason or cause whatsoever, and there shall be no individual lockout, strikes or stoppage pending the determination of any complaint or grievance.

“Should there be a stoppage of work in the factory of the Employer, immediate notice thereof shall be given by the Employer to the Union. The latter obligates itself to return the workers to their work immediately upon notification of such stoppage. The consideration of stoppage and lockout cases shall have precedent over or shall be considered simultaneously with complaints or grievances.” [Tr. 28].

Appellee asserts that Appellant by closing its plants in Long Beach and Los Angeles during the contract term and transferring its manufacturing operations to its own wholly-owned factory in Phoenix, which factory was not covered by the terms of the collective bargaining agreement, and at a time when Appellant was attempting to secure a lower wage structure for its operations in California was a lockout within the meaning of Article 15 of the collective agreement.

Again, the parties are locked in a dispute which can be resolved only by interpretation of the contract between them. In such a posture

“The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is then confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator’s judgment, when it was his judgment and all that it connotes that was bargained for.” *United Steelworkers v. American Mfg. Co. supra*, at pp. 567-568.

On the other hand, Appellant claims that the union’s grievance is “. . . a completely frivolous claim buttressed only by the language of the Supreme Court in the *United Steelworkers* case”² (App. Br. pp. 11-12).

In one of these cases *Warrior & Gulf Navigation, supra*, the Company laid off some employees covered by the agreement due in part to the fact that it had contracted out certain maintenance work done by these employees. The contract as in the case at bar, contained both a no strike and no lock-out provision, and also as in the instant case, had a broad arbitration clause calling for the arbitration of differences as to the “meaning and application” of the collective agree-

²Referring to the *American Mfg. & Warrior & Gulf Navigation* cases, *supra*.

ment as well as “any local trouble of any kind” that should arise. It, however, contained a provision, totally absent from the contract in question herein, which provided that “matters which are strictly a function of management shall not be subject to arbitration”. Yet, the Supreme Court directed arbitration holding that any doubts as to subject matter to be arbitrated should be resolved in favor of coverage.³

A fortiori, a termination of employment resulting from a transfer of work from the bargaining unit covered by the collective agreement, to a unit not so covered is an arbitrable claim under an arbitration provision which is not only as broad in its scope as that which was contained in the *Warrior & Gulf* agreement, but fails to contain restrictions of any kind as to the arbitrability of any decision made by management, whether a function of management, or not.⁴ Indeed, if anything can be said with “positive assurance”

³See also *United Steelworkers v. American Mfg. Co.*, *supra*, which involved an arbitration clause, to all intents and purposes indistinguishable from that involved herein, where the United States Supreme Court held that arbitration was not barred where an employee who had been refused reinstatement had accepted a workmens compensation settlement on the basis of a permanent disability and thereafter claimed seniority rights, despite the fact that contract also contained a “management rights” clause which reserved to the Company the power to suspend or discharge any employee for “cause.” The arbitration clause in the *American Mfg. Co.* case reads:

“Any disputes, misunderstandings, differences of grievances arising between the parties as to the meaning, interpretation and application of the provisions of this agreement, which are not adjusted as herein provided, may be submitted to the Board of Arbitration for decision . . .”

⁴See also *Sidele Fashions*, 133 N. L. R. B. No. 49 where the Board for the purposes of the National Labor Relations Act found similar conduct for a similar motive to constitute a lockout for the purposes of that statute.

it is that the parties hereto have actually contracted to submit the subject matter herein to arbitration, thus meeting a more stringent test than is demanded by the U. S. Supreme Court in determining the issue of arbitrability.

In short, the threshold issues to a court decree directing arbitration in this action have been more than met:

(1) The parties hereto have contracted to resolve all questions of interpretation and violations of the collective agreement to arbitration; (2) Appellant, after a request therefor by Appellee has reneged on its obligation to do so; and (3) the claims raised by Appellee are on their face governed by the contract. Hence, the order of the court below directing arbitration of those disputes must be sustained.

III.

Appellant's Defenses to This Action Are Without Merit, as They Are Based on a Misconception of the Nature of the Cause of Action Herein.

As a further demonstration of its failure to comprehend the gravamen of this action, Appellant raises affirmative defenses and relies upon state and federal court decisions which have no bearing upon the federal substantive law of labor arbitration to be applied herein.

A. In This Action to Remedy a Specific Breach of the Agreement to Arbitrate, Other Lawsuits to Remedy Other Breaches of This Agreement Cannot Give Rise to a Defense of Splitting of a Cause of Action.

From the foregoing analysis, it is clear that this suit under Section 301(a) of the Labor-Management Relations Act of 1947, asserts a claim for relief engendered by a refusal to comply with a contractual obligation to

arbitrate, and arises solely from the Appellant's refusal to so arbitrate. It is equally clear that the claim for relief for such refusal to arbitrate is independent of, *Point I, supra*, and unrelated to the disputes upon the merits of which arbitration is required. *R. F. C. v. Harrisons & Grosfield, Ltd., supra*.

Neither the subject matter of the breaches which are to be arbitrated, the manner in which they occurred or the time when they occurred, are in any way circumscribed by the agreement to arbitrate. Hence, it was only

“ . . . when the agreement was breached, [that] the union's cause of action to specifically enforce the agreement to arbitrate arose and continued unaffected by time until the breach of it was determined and compliance with it ordered.”

Item Company v. New Orleans Newspaper Guild, supra.

The specific breach of the agreement to arbitrate occurred in October 1960 [Tr. 94]. Nevertheless, Appellant asserts that Appellee has split its cause of action by bringing this action to remedy Appellant's breach herein after Appellee successfully prosecuted an action in the courts of the State of California for an entirely separate breach of the agreement to arbitrate, which different breach occurred in 1957. Appellant does not comprehend that its breach of the agreement to arbitrate in 1957, when the Appellee sought to arbitrate Appellant's refusal to pay accrued vacation and holiday pay to its employees in violation of Articles 9 and 11 of the collective agreement gave rise to one cause of action, and that its refusal in 1960, to abide by its con-

tractual obligation to arbitrate its violation of Articles 15 and 17 of the Agreement, by manufacturing garments in a factory not covered by the terms of the collective agreement, and locking out its employees, gives rise to a second and distinct cause of action. Each refusal to arbitrate is independent of the other and each gives rise to a separate and distinct claim for relief. *Goodall-Sanford, Inc. v. United Textile Workers, supra*; *R.F.C. v. Harrisons & Grosfield, supra*; *Item Company v. New Orleans Newspaper Guild, supra*. Each action seeks relief from entirely different breaches of the agreement to arbitrate, which breaches arise not only at different times, but are also bottomed on grievances arising from distinct and separate sections of the collective agreement. Thus, there are two distinct claims for relief, and there is no splitting of a cause of action.

In a further effort to buttress its asserted defense that Appellee split one cause of action, Appellant cites the decision of this Court in *Shatte v. International Alliance*, 182 F. 2d 158. That case involved an action by individual employees for a breach of their individual contracts of employment. This Court properly held that the cause of action for breach of the employee's contract of employment accrued in its entirety when the individual employee was discharged in violation of his own contract of employment and that a second cause of action therefor did not lie. Appellee has no argument with the general rule that an employee so discharged may sue only once and at that time recover all present and prospective damages. We cannot, however, see where the rule of the *Shatte* case, or any other similar authority relied on by Appellant has any connection with the case at bar. The instant proceeding is not an action

for wages; it is not an action to enjoin a lockout or recover damages therefor; nor is it an action to require Appellant to manufacture its garments in plants covered by the collective agreement; however, it is an action which seeks solely to secure for Appellee the judgment of an arbitrator on the merits of those questions. It was the arbitrator's judgment and all that it connotes that was bargained for and promised in the agreement sued upon. *United Steelworkers v. American Mfg. Co. supra*. Indeed, if Appellant was serious in its contention that this proceeding is nothing more, nor less, than an action brought by Appellant for wages, including vacation and holiday pay, owed by Appellant to its employees⁵ as a result of its breach of the collective agreement, then it most certainly would have at least cited *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U. S. 437 (1955), in its brief to this Court, and emphasized its fifth affirmative defense,⁶

“that [Appellant], has no powers or legal capacity to demand . . . wage claims for individual employees, since claims for wages are a uniquely personal right to each individual employee arising out of contracts of hire which are separate and apart from the collective bargaining agreement.” [Tr. 37-38].

This, it failed to do, because the *Westinghouse* rule is not applicable to an action to compel arbitration pursuant to Section 301 of the Labor Management Relations

⁵App. Brief, pp. 5, 8.

⁶The sole reference made by Appellant to this defense is in page 4 of its Brief (Statement of Facts), where it sets out all of the affirmative defenses raised by it in its Answer.

Act of 1947, inasmuch as the right here being sought to be enforced is one peculiar to the Appellant-employer and Appellee-union, the contracting parties, and not to the individual employees; that right is the enforcement of the agreement to arbitrate, which Appellant has breached, none other.

B. Appellant's Asserted Defenses of Res Judicata, Collateral Estoppel, Waiver and Laches, Cannot Bar This Action and, if Anything, Serve to Support the Judgment of the Court Below.

As a further defense to this action, Appellant relies upon the judgment of the Supreme Court of California that held that Appellant upon a separate and prior occasion improperly breached its obligation to arbitrate a question arising under distinct and different provisions of the Agreement, namely Articles 9 and 11. Yet, Appellant asserts that that judgment of the state court in that different cause of action constitutes *res judicata* or a collateral estoppel of the case at bar.

The Supreme Court of California in *Jerome Posner, as Manager of Los Angeles Joint Board, Amalgamated Clothing Workers of America v. Grunwald-Marx, Inc.*, 56 A. C. 159, 363 P. 2d 313 (1961), held that Appellant, defendant in that action, had breached its agreement with Appellee to arbitrate by refusing to submit to arbitration the issue of accrued vacation and holiday pay earned by Appellant's employees for the year 1957, under Articles 9 and 11 of said agreement. The issues before the highest Court of California in that case were: the existence of an agreement between the parties to arbitrate; a refusal by the Defendant (Appellant herein) to proceed to arbitration when so requested by Plaintiff (Appellee herein) in 1957; and, whether the claims in

that case which the Plaintiff wished to arbitrate were on their face governed by the contract. The California court found for Plaintiff in that action, on all issues, and entered a final judgment of that cause of action, by ordering arbitration for that specific breach of the agreement to arbitrate.

Since the cause of action herein is based upon a different claim for relief, the judgment of the court in *Posner v. Grunwald-Marx*, *supra*, cannot be *res judicata* so as to bar prosecution of this proceeding by Appellee. In *Cromwell v. County of Sac*, 94 U. S. 681 the United States Supreme Court defined the thrust of *res judicata* in holding that a judgment upon the merits in a first action bars the subsequent prosecution of a second action based upon the same claim for relief. The Supreme Court therein held that a judgment on the merits was not only an absolute bar against a subsequent suit on the same cause of action, but also barred the parties on every matter which was offered or received to sustain or defeat the claim for relief in the first action as well as every other admissible matter which might have been offered for that purpose. Under this definition of *res judicata*, as set forth by the United States Supreme Court, the judgment of the California Supreme Court upon the cause of action therein asserted cannot be *res judicata* of the different cause of action asserted herein.

Similarly, the judgment of the California Supreme Court in *Posner v. Grunwald-Marx*, *supra*, cannot act as a collateral estoppel of the cause of action herein. In *Cromwell v. County of Sac*, *supra*, the United States Supreme Court also held that where there is a second action between parties upon a different claim

for relief, the judgment in a prior action between the parties operates as an estoppel only as to those matters in issue or points controverted in the prior action, upon the determination of which the finding or verdict was rendered. Where, as in the case at bar, it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be to the point or question actually litigated and determined in the original action, not what might have been litigated and determined. Only upon such matters is the judgment in the first action conclusive in the second. *Cromwell v. County of Sac, supra.*

Applying this directive of the United States Supreme Court to the instant proceeding, we find that the issue of Appellee's demand for arbitration in 1960 was not litigated in the California state court action. Hence, the judgment therein does not estop determination of that issue in this proceeding. We also discover that the question of whether it can be said with "positive assurance" that the claims which Appellee seeks to have arbitrated, are not governed by the contract (breaches of the agreement to manufacture garments only in plants covered by the terms of the collective agreement and the locking out of the employees,) was not litigated in the state court action, and therefore the judgment therein does not estop determination of these issues in this proceeding. And, we further discover that the California state court based its determination upon a finding that the arbitration clause constituted an agreement between the parties providing for "a complete system of industrial self-government" covering all disputes between the parties. *Posner v. Grunwald-Marx, supra.* Therefore, the principle of collateral estoppel,

raised as a defense to this action, boomerrangs, and estops Appellant from questioning the scope of the arbitration agreement, it already having been judicially determined to encompass all disputes between the parties.

In like measure, the judgment of the California Supreme Court estops Appellant from asserting a defense of waiver to Appellee's effort to obtain arbitration of the lock-out claim. Relying upon one sentence of Article 15 of the collective agreement, which sentence Appellant has lifted out of context, Appellant urges that its interpretation of that sentence demonstrates that Appellee has waived its right to arbitrate the lock-out issue (Appellant's Br. p. 16). This defense, however, must fall on two grounds. First, since this defense rests upon an interpretation of contract language, it is for the arbitrator and the arbitrator alone to determine the effect of this contract language, for it was the judgment of the arbitrator which was bargained for by the parties, *United Steelworkers v. American Mfg. Co.*, *supra*. Although no counterinterpretation is necessary, it should be pointed out that Article 15 as a whole deals with strikes and lock-outs, and the one sentence that Appellant seeks to interpret, merely emphasizes that in the event that either situation occurs, it shall receive priority over, or simultaneous treatment with, other grievances then raised or pending and unresolved. Such is not the case herein.

Second, by its own reasoning and on the basis of the law invoked by Appellant, it is estopped from raising the defense of waiver since the California Supreme Court found in *Posner v. Grunwald-Marx*, *supra*, that waiver is a question of fact which gets into the merits of the matter to be arbitrated, the determination of which is for the arbitrator, and not for a court.

So too, the distinction between the defenses which apply to this action based upon Appellant's breach of the agreement to arbitrate, and possible defenses which Appellant may have to the claims which Appellee seeks to arbitrate, sustain the judgment of the court below in denying Appellant's asserted defense of laches. As stated before, this Court has before it only the issues pertaining to Appellant's refusal to abide by its obligation to arbitrate in 1960. The cause of action for breach of the obligation to arbitrate accrued when Appellee asked Appellant to arbitrate the disputes between them and Appellant refused to do so. Since the instant action was brought within the period fixed by the statute of limitations, the Appellant's plea of laches must show extraordinary circumstances to exist which require the doctrine to be applied. Appellant herein asserted as such extraordinary circumstances that it would be required to retain counsel and pay reasonable counsel fees in defense of this action and on this specious ground would have had the court below invoke the doctrine of laches. The District Court correctly found that Appellant had not sustained the burden of proving extraordinary circumstances as to make inequitable the granting of relief to Appellee from Appellant's breach of the agreement to arbitrate, and hence, it properly denied this defense. *R. F. C. v. Harrisons & Grosfield, Ltd., supra; International Association of Machinists v. Hayes Corp.* (C. A. 5, 1961), F. 2d, 49 L. R. R. M. 2210.

Conclusion.

The Federal substantive law of arbitration is applicable to the instant case. This law as enunciated by the United States Supreme Court, limits this Court to the consideration of two issues, namely:

1. Can it be said “with positive assurance” that the parties *have not* contracted to submit to the arbitrator the questions of contract interpretation and violation sought to be arbitrated?

2. Has one party, the Appellant herein, refused to proceed to arbitrate such issues?

The collective bargaining agreement herein provides, that all disputes between the parties relating directly or indirectly to the provisions of the agreement shall be submitted to arbitration [Article 14, Tr. 27].

This is an all-inclusive submission of all questions of contract interpretation to the judgment of the arbitrator within the meaning of the Federal substantive law of arbitration. There are no exceptions or limitations on this submission, and hence, as a matter of fact, it can be stated with “positive assurance” that Appellant herein has actually contracted to submit the questions of contract interpretation involved herein to arbitration. There are no doubts which remain to be resolved in favor of coverage.

This Court, under the mandate of the United States Supreme Court, has no concern with the appellant’s arguments concerning the merits of the underlying grievances nor any of the alleged defenses thereto.

The sole remedy sought by the instant action is to compel the Appellant to abide by its agreement to arbitrate disputes arising directly, or indirectly, under the terms of the said agreement. This remedy then is di-

rected solely to Appellant's refusal to arbitrate these differences. This refusal occurred on October 13, 1960 [Tr. 94], and the Court below properly ordered the Appellant to remedy its breach by proceeding to arbitrate.

Wherefore, it is respectfully submitted that the judgment of the Court below is correct and should be affirmed.

Respectfully submitted,

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No. 17502

**United States
Court of Appeals**
for the Ninth Circuit

GRUNWALD-MARX, INC.,

Appellant,

vs.

LOS ANGELES JOINT BOARD, AMALGA-
MATED CLOTHING WORKERS OF AMER-
ICA, an unincorporated voluntary association,

Appellee.

Transcript of Record

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Affidavit of Fred Grunwald.....	96
Affidavit of Jerome Posner.....	82
Exhibits D through L.....	84-94
Amended Complaint.....	13
Exhibits A through C.....	19-34
Answer to Amended Complaint.....	35
Exhibits A through D.....	38-79
Answer to Complaint.....	9
Certificate by the Clerk.....	118
Complaint	3
Designation of Contents of Record on Appeal (Dist. Ct.).....	117
Designation of Record (U.S.C.A.).....	120
Findings of Fact, Conclusions of Law and Judg- ment	109
Judgment	115
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	116
Notice of Motion for Summary Judgment, Defend- ant's	95
Notice of Motion for Summary Judgment, Plain- tiff's	81
Order	104
Statement of Points Relied on (U.S.C.A.).....	120

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RAY L. JOHNSON, JR.,
411 West Fifth Street
Los Angeles 13, California

For Appellee:

WIRIN, RISSMAN, OKRAND & POSNER
FRED OKRAND
257 South Spring Street
Los Angeles 12, California

JACOB SHEINKMAN
15 Union Square
New York 3, New York

In the United States District Court,
Southern District of California,
Central Division

No. 1190-60 MC

LOS ANGELES JOINT BOARD, AMALGAM-
ATED CLOTHING WORKERS OF AMERICA,
an unincorporated voluntary association,

Plaintiff,

vs.

GRUNWALD-MARX, INC., a California corporation,
Defendant.

COMPLAINT FOR SPECIFIC PERFORMANCE,
TO COMPEL ARBITRATION, UNDER AND
PURSUANT TO SECTION 301(a) OF THE
LABOR-MANAGEMENT RELATIONS ACT.

Comes Now plaintiff above named and for cause of
action against the defendant alleges:

I.

Plaintiff, Los Angeles Joint Board, Amalgamated
Clothing Workers of America, a labor organization
within the meaning of the Labor-Management Rela-
tions Act of 1947 (hereinafter referred to as the Act),
is a voluntary unincorporated association representing
employees in the men's apparel industry in the South-
ern District of California, including employees of the
defendant, in an industry affecting commerce within

the meaning of the Act. Plaintiff maintains its principal place of business in the City and County of Los Angeles, State of California.

II.

Defendant, Grunwald-Marx, Inc., is a corporation duly organized and existing under the laws of the State of California, having its principal place of business in the City of Los Angeles, State of California. Defendant maintains a manufacturing plant in the City of Phoenix, State of Arizona, and defendant is engaged at Los Angeles, California and at Phoenix, Arizona in the design, manufacture, sale and distribution of men's shirts. In the course of the conduct of its business operations, defendant causes large quantities of raw materials and finished products having a value in excess of \$50,000. to be shipped and transported annually from its manufacturing plant in the State of Arizona to points outside that State. Defendant is engaged in commerce within the meaning of Section 2, subsections (6) and (7) of the Act.

III.

This is a suit based upon violation of and seeking performance of a contract between a labor organization representing employees in an industry affecting interstate commerce as defined in said Act, and an employer engaged in operations affecting interstate commerce within the meaning of the Act as more fully hereinafter appears. This Court has jurisdiction over the persons and subject matter herein under and pursuant to the provisions of said Section 301(a) of the Act, 61 Stat. 156, 29 USC Sec. 185(a).

IV.

On or about October 1, 1953, plaintiff and defendant entered into a written collective bargaining agreement covering the wages, hours and working conditions of all of the defendant's employees, except executives, administrative and supervisory employees, office clerical employees, salesmen, designers, receiving and shipping guards and watchmen, at the two factories of the defendant then in existence and the only factories then operated by it. These factories were located at Long Beach, California and Los Angeles, California. In said Agreement, plaintiff was recognized as the exclusive bargaining representative of the described employees of the defendant with regard to wages, hours and working conditions. A copy of said collective bargaining agreement is referred to herewith, incorporated herein and made a part hereof as though fully set forth and marked "Exhibit A".

On or about October 23, 1956, plaintiff and defendant entered into a written agreement acknowledging the continued existence of the collective bargaining agreement of October 1, 1953, and extended the said latter Agreement, which covered all of the employees of the defendant that are described in the previous paragraph of this allegation at the two factories of the defendant then in existence and the only factories then operated by it. These factories were located at Long Beach, California and Los Angeles, California. By the terms of said Agreement, which was extended to September 30, 1959, plaintiff continued as the exclusive bargaining representative of the described employees of the defendant with regard to wages, hours

and working conditions. A copy of said Agreement of October 23, 1956 is referred to herewith, incorporated herein and made a part hereof as though fully set out and is marked "Exhibit B".

V.

On or about November 21, 1956, the defendant's President sent a letter to plaintiff's Manager which specifically acknowledged defendant's understanding with plaintiff that the Agreement of October 23, 1956 covered defendant's employees in its Los Angeles, California and Long Beach, California factories. These were the two factories of the defendant then in existence and the only factories then operated by it. A copy of said letter of November 21, 1956 is referred to herewith, incorporated herein and made a part hereof as though fully set out and is marked "Exhibit C".

VI.

Said Agreement of October 1, 1953, as extended on or about October 23, 1956 (Exhibits A and B hereof) and said letter dated November 21, 1956 (Exhibit C hereof) were in full force and effect at the time the dispute between the parties hereto arose as is more specifically alleged below.

VII.

Article 14 of Exhibit A hereof provides for the settlement of all complaints, grievances or disputes arising between the parties relating directly or indirectly to the provisions of the Agreement or the refusal of either party to perform the whole or any part thereof.

Article 15 of Exhibit A prohibits strikes and stoppages for any reason or cause whatsoever.

VIII.

On or about April 10, 1957, defendant commenced shifting its manufacturing operations from its manufacturing plants located in the cities of Long Beach and Los Angeles, County of Los Angeles, State of California, which plants are covered by Exhibits A, and B, and C hereof, to a manufacturing plant, not covered by Exhibits A and B, and C hereof, in the City of Phoenix, State of Arizona.

On or about May 29, 1957, defendant completed shifting its manufacturing operation from its manufacturing plants located in the cities of Long Beach and Los Angeles, County of Los Angeles, State of California, which plants are covered by Exhibits A, B, and C hereof, to a manufacturing plant, not covered by Exhibits A, B, and C hereof, in the City of Phoenix, State of Arizona.

IX.

Plaintiff alleges that as a result of the actions referred to in Paragraph VIII above a controversy and dispute has arisen under the Agreement (Exhibits A and B hereof), embraced by Article 14 of Exhibit A hereof. The matters in dispute between plaintiff and defendant which now exist are the following:

(a) Since on or about April 10, 1957, and continuously thereafter, down to and including September 30, 1959, defendant manufactured garments and caused them to be manufactured in violation of Article IV of Exhibit A hereof.

(b) On or about May 29, 1957 defendant did lock out its employees, covered by Exhibits A and B hereof, at its plants located in Long Beach and Los Angeles, California, and did continuously thereafter, up to and including September 30, 1959, maintain said lockout, all in violation of Article 15 of Exhibit A hereof.

X.

Plaintiff alleges that by the actions referred to in Paragraph IX above, the defendant denied and failed to pay its employees, covered by Exhibits A and B hereof, wages, and other benefits due to them, including, but not limited to, holiday and vacation pay, and defendant has failed to make insurance contributions pursuant to the provisions of Article 12 of Exhibits A and B hereof, and defendant has caused the plaintiff to suffer loss of membership, dues and initiation fees pursuant to the provisions of Article 18 of Exhibits A and B hereof.

XI.

Representatives of plaintiff and defendant have taken up the disputes referred to in Paragraph IX for adjustment, but said representatives have not been able to adjust or resolve said disputes. Plaintiff has requested the defendant in writing to proceed with arbitration of said disputes and controversies in the manner required and provided in Paragraph 14 of Exhibit A hereof. But, defendant has refused and does now refuse to submit the matters to arbitration.

Wherefore, plaintiff prays judgment as follows:

1. That defendant specifically be required to perform Article 14 of Exhibit A hereof, particularly with respect to said disputes which are heretofore described.

2. That defendant be restrained from in any manner failing or refusing to perform its obligations under said Article 14 of Exhibit A hereof, and particularly with respect to said described disputes.

3. That plaintiff shall have costs of the suit herein.

4. That plaintiff may have such other and further relief as the Court shall deem just and proper.

WIRIN, RISSMAN, OKRAND
& POSNER

ROBERT R. RISSMAN
JACOB SHEINKMAN

/s/ By ROBERT R. RISSMAN
Attorneys for plaintiff.

[Endorsed]: Filed Oct. 18, 1960.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Comes Now defendant, Grunwald-Marx, Inc., and for answer to the complaint herein admits, denies and alleges as follows:

I.

Answering Paragraph II of the complaint, this answering defendant denies that defendant maintains a

manufacturing plant in the City of Los Angeles, State of California. Except as herein denied, this answering defendant admits the allegations of Paragraph II of the complaint.

II.

Answering Paragraphs III, IX, X and XI of the complaint, this answering defendant denies generally and specifically each and all of the allegations therein contained.

III.

This answering defendant admits the allegations of Paragraphs I, IV, V, VI, VII and VIII of the complaint.

For a First Affirmative Defense, Defendant Alleges:

On or about October 6, 1959, plaintiff filed a third amended petition to compel arbitration of the subject matter and claims set forth in the instant complaint in the Los Angeles Superior Court, being Case No. 689,026 (The original petition was filed October 27, 1957). A certified copy of the Third Amended Petition is attached hereto, marked Exhibit "A", and incorporated herein.

A certified copy of defendant's Amended Answer to plaintiff's Third Amended Petition is attached hereto, marked Exhibit "B" and incorporated herein.

Trial of the issues was held in the Los Angeles Superior Court and on May 16, 1960, Judge Clarke E. Stephens entered his findings of fact and conclusions of law. A certified copy of the Court's Findings

of Fact and Conclusions of Law is attached hereto, marked Exhibit "C" and incorporated herein.

On May 16, 1960, Judge Clarke E. Stephens entered his judgment and order denying arbitration and dismissing the proceedings. A certified copy of the Court's Judgment and Order is attached hereto, marked Exhibit "D", and incorporated herein.

On or about June 10, 1960, plaintiff filed an appeal from the judgment and order denying arbitration in the District Court of Appeal, and the matter is presently pending in said court.

By virtue of the pendency of the prior action aforesaid, plaintiff is barred from prosecuting this action in the Federal District Court under federal law, and this action should be abated.

For a Second, Separate and Further Defense,
Defendant Alleges:

Plaintiff has made an election of remedies in filing the said petition in the Los Angeles Superior Court for specific performance to compel arbitration of the said subject matter and said claims and is thereby barred from prosecuting the instant action.

For a Third, Separate and Further Defense,
Defendant Alleges:

By virtue of the pendency of the prior action aforesaid, plaintiff is estopped from prosecuting the instant action.

For a Fourth, Separate and Further Defense,
Defendant Alleges:

There has been an unreasonable delay of three and one-half years on the part of plaintiff in requesting arbitration of matters set forth in the complaint, and plaintiff is estopped from now demanding arbitration of said matters.

For a Fifth Separate and Further Defense,
Defendant Alleges:

Plaintiff has no power or legal capacity to demand or compel arbitration of wage claims for individual employees, since claims for wages are a uniquely personal right of each individual employee arising out of contracts of hire which are separate and apart from the collective bargaining agreement.

Wherefore, defendant prays judgment that plaintiff take nothing by its complaint, for costs of suit herein, and such other relief as the Court may deem just and proper.

HILL, FARRER & BURRILL
/s/ By RAY L. JOHNSON, JR.
Attorneys for Defendant.

Affidavit of Service by Mail Attached.

[Endorsed] : Filed Nov. 8, 1960.

[Title of District Court and Cause.]

AMENDED COMPLAINT FOR SPECIFIC PERFORMANCE, TO COMPEL ARBITRATION, UNDER AND PURSUANT TO SECTION 301(a) OF THE LABOR-MANAGEMENT RELATIONS ACT.

Comes Now plaintiff above named and for cause of action against the defendant alleges:

I

Plaintiff, Los Angeles Joint Board, Amalgamated Clothing Workers of America, a labor organization within the meaning of the Labor-Management Relations Act of 1947 (hereinafter referred to as the Act), is a voluntary unincorporated association representing employees in the men's apparel industry in the Southern District of California, including employees of the defendant, in an industry affecting commerce within the meaning of the Act. Plaintiff maintains its principal place of business in the City and County of Los Angeles, State of California,

II

Defendant, Grunwald-Marx, Inc., is a corporation duly organized and existing under the laws of the State of California, having its principal place of business in the City of Los Angeles, State of California. Defendant maintains a manufacturing plant in the City of Phoenix, State of Arizona, and defendant is engaged at Los Angeles, California and at Phoenix, Arizona in the design, manufacture, sale and distribution of men's shirts. In the course of the conduct of its

business operations, defendant causes large quantities of raw material and finished products having a value in excess of \$50,000.00 to be shipped and transported annually from its manufacturing plant in the State of Arizona to points outside that State. Defendant is engaged in commerce within the meaning of section 2, subsections (6) and (7) of the Act.

III

This is a suit based upon violation of and seeking performance of a contract between a labor organization representing employees in an industry affecting interstate commerce as defined in said Act, and an employer engaged in operations affecting interstate commerce within the meaning of the Act as more fully hereinafter appears. This Court has jurisdiction over the persons and subject matter herein under and pursuant to the provisions of said Section 301(a) of the Act, 61 Stat. 156, 29 USC Sec. 185(a).

IV

On or about October 1, 1953, plaintiff and defendant entered into a written collective bargaining agreement covering the wages, hours and working conditions of all of the defendant's employees, except executives, administrative and supervisory employees, office clerical employees, salesmen, designers, receiving and shipping, guards, and watchmen, at the two factories of the defendant then in existence and the only factories then operated by it. These factories were located at Long Beach, California and Los Angeles, California. In said Agreement, plaintiff was recognized as the exclusive bargaining representative of the described

employees of the defendant with regard to wages, hours and working conditions. A copy of said collective bargaining agreement is referred to herewith, incorporated herein and made a part hereof as though fully set forth and marked "Exhibit A".

On or about October 23, 1956, plaintiff and defendant entered into a written agreement acknowledging the continued existence of the collective bargaining agreement of October 1, 1953, and extended the said latter Agreement, which covered all of the employees of the defendant that are described in the previous paragraph of this allegation at the two factories of the defendant then in existence and the only factories then operated by it. These factories were located at Long Beach, California and Los Angeles, California. By the terms of said Agreement, which was extended to September 30, 1959, plaintiff continued as the exclusive bargaining representative of the described employees of the defendant with regard to wages, hours and working conditions. A copy of said Agreement of October 23, 1956 is referred to herewith, incorporated herein and made a part hereof as though fully set out and is marked "Exhibit B."

V

On or about November 21, 1956, the defendant's President sent a letter to plaintiff's Manager which specifically acknowledged defendant's understanding with plaintiff that the Agreement of October 23, 1956 covered defendant's employees in its Los Angeles, California and Long Beach, California factories. These were the two factories of the defendant then in existence and the only factories then operated by it. A

copy of said letter of November 21, 1956 is referred to herewith, incorporated herein and made a part hereof as though fully set out and is marked "Exhibit C."

VI

Said Agreement of October 1, 1953, as extended on or about October 23, 1956 (Exhibits A and B hereof) and said letter dated November 21, 1956 (Exhibit C hereof) were in full force and effect at the time the dispute between the parties hereto arose as is more specifically alleged below.

VII

Article 14 of Exhibit A hereof provides for the settlement of all complaints, grievances or disputes arising between the parties relating directly or indirectly to the provisions of the Agreement or the refusal of either party to perform the whole or any part thereof.

Article 15 of Exhibit A prohibits strikes and stoppages for any reason or cause whatsoever.

VIII

On or about April 10, 1957, defendant commenced shifting its manufacturing operations from its manufacturing plants located in the cities of Long Beach and Los Angeles, County of Los Angeles, State of California, which plants are covered by Exhibits A, and B, and C hereof, to a manufacturing plant, not covered by Exhibits A and B, and C hereof, in the City of Phoenix, State of Arizona.

On or about May 29, 1957, defendant completed shifting its manufacturing operation from its manufacturing plants located in the cities of Long Beach

and Los Angeles, County of Los Angeles, State of California, which plants are covered by Exhibits A, B, and C hereof, to a manufacturing plant, not covered by Exhibits A, B, and C hereof, in the City of Phoenix, State of Arizona.

IX

Plaintiff alleges that as a result of the actions referred to in Paragraph VIII above a controversy and dispute has arisen under the Agreement (Exhibits A and B hereof), embraced by Article 14 of Exhibit A hereof. The matters in dispute between plaintiff and defendant which now exist are the following:

(a) Since on or about April 10, 1957, and continuously thereafter, down to and including September 30, 1959, defendant manufactured garments and caused them to be manufactured in violation of Article IV of Exhibit A hereof.

(b) On or about May 29, 1957 defendant did lock out its employees, covered by Exhibits A and B hereof, at its plants located in Long Beach and Los Angeles, California, and did continuously thereafter, up to and including September 30, 1959, maintain said lockout, all in violation of Article 15 of Exhibit A hereof.

X

Plaintiff alleges that by the actions referred to in paragraph IX above, the defendant either:

1. Deprived, denied and/or failed to pay its employees covered by Exhibits A and B hereof the wages due them under Exhibit A, and/or

2. Deprived, denied and/or failed to pay its employees covered by Exhibits A and B hereof holiday pay for July 4, 1957 and every other holiday with pay subsequent thereto due them under Exhibit A up to and including Labor Day 1959, and/or

3. Deprived, denied and/or failed to pay its employees covered by Exhibits A and B hereof vacation pay for the years 1958 and 1959 due them under Exhibit A, and/or

4. Failed to make insurance contributions pursuant to the provisions of Article XII of Exhibits A and B hereof, and/or

5. Caused the plaintiff to suffer loss of membership dues and initiation fees pursuant to the provisions of Article XVIII of Exhibits A and B hereof.

XI

Representatives of plaintiff and defendant have taken up the disputes referred to in Paragraph IX for adjustment, but said representatives have not been able to adjust or resolve said disputes. Plaintiff has requested the defendant in writing to proceed with arbitration of said disputes and controversies in the manner required and provided in Paragraph 14 of Exhibit A hereof. But, defendant has refused and does now refuse to submit the matters to arbitration.

Wherefore, plaintiff prays judgment as follows:

1. That defendant specifically be required to perform Article 14 of Exhibit A hereof, particularly with respect to said disputes which are heretofore described.

2. That defendant be restrained from in any manner failing or refusing to perform its obligations under said Article 14 of Exhibit A hereof, and particularly with respect to said described disputes.

3. That plaintiff shall have costs of the suit herein.

4. That plaintiff may have such other and further relief as the Court shall deem just and proper.

WIRIN, RISSMAN, OKRAND &
POSNER,

ROBERT R. RISSMAN,
JACOB SHEINKMAN,

/s/ By ROBERT R. RISSMAN,
Attorneys for Plaintiff.

Exhibit A

AGREEMENT

Agreement made this 1st day of October, 1953, by and between the Amalgamated Group of the Pacific Coast Garment Manufacturers (hereinafter referred to as the "Association") and the individual members thereof signatory hereto (referred to as the Company) and the Los Angeles Joint Board, Amalgamated Clothing Workers of America (hereinafter referred to as the "Union").

It is the intent and purpose of the Company and the Union that this Agreement shall promote and improve industrial and economic relationships between the Company and its employees, and provide for wages, hours of

work and conditions of employment of the employees of the Company. It is expected that the respective representatives of both parties to this Agreement shall represent in the factory and in their dealings the co-operative spirit of the Agreement and shall be leaders in promoting that amity and spirit of good will which is the purpose of this instrument to establish.

Now, Therefore, in consideration of the mutual covenants, promises and agreements herein contained, the parties hereto agree as follows:

1. Coverage:

The term "employee" as used in this Agreement shall include all of the employees of the Company, except executives, administrative and supervisory employees, office clerical employees, salesmen, designers, receiving and shipping, guards and watchmen (even though they may have maintenance and janitorial duties.)

2. Union Recognition:

The Company recognizes the Union as the exclusive bargaining representative of its employees with reference to wages, hours and working conditions.

3. Union Security:

(a) There shall be a trial period of 30 working days for all new employees after commencement of their employment. Employees on a trial period at the time of the execution of this Agreement shall not lose time already spent on trial. The employment of any employee on trial may be terminated without resort to the grievance procedure. If any employee is continued in the employ of the Company after the end of the trial period

as above described he shall become a regular employee entitled to all the benefits of this Agreement.

(b) Membership in the Union on and after the 30th working day following the beginning of employment for each employee or following the effective date of this Agreement, whichever is later, shall be required as a condition of employment of each employee.

(c) All employees who are now members or hereafter become members of the Union shall, as a condition of continued employment, remain members in good standing during the term of this Agreement.

(d) The employment office maintained by the Union shall be made available to both members and non-members of the Union. The Union warrants that in the operation of such an office and in referrals to the Employer, it shall not discriminate against any individual applicant because of non-membership in the Union. The Employer agrees that in the event he shall require additional employees, he shall hire such additional employees from the aforesaid employment office. In the event that the aforesaid employment office is unable to supply the requested employees within 48 hours following the request, the Employer shall be free to hire such additional employees in the open market.

4. Union Representatives:

(a) The Company shall recognize and deal with such representatives as the Union may elect or appoint and shall permit the duly accredited representatives of the Union to visit the Company's factories at reasonable times mutually agreeable.

(b) The Company will provide a bulletin board space for the posting of Union notices and bulletins pertaining to working conditions under this contract.

(c) The Company agrees to make available to the Union such payroll and production records as is reasonably necessary to be inspected in connection with the terms hereof. Such records as are made available to the Union shall be confidential.

5. Hours of Work:

The regular work week shall be forty (40) hours, five days per week from Monday to Friday inclusive of not more than eight (8) hours in one day. All work performed in excess of eight (8) hours each day or forty (40) hours each week and all work performed on Saturday shall constitute overtime and shall be paid for at the rate of time and one half, except where employee has been absent on his own account or for just cause, then Saturday may be worked at regular time. All work performed on Sunday and holidays shall be paid for at double time, in addition to the regular pay for such holiday.

6. New Piece Work Rates:

In the event that any of the existing operations of the Company are changed or new operations are added, piece rates for such operations shall be mutually agreed upon between the Union and the Company, and shall become effective at the time that the operation is changed or new operation begun.

7. Apprentices:

The Employer shall have the right to employ apprentices in all crafts provided, however, that the term

of apprenticeship and wage scales for such apprentices shall be agreed upon between the Union and the Employer.

8. Work Changes:

Operators' work may be changed as required to meet changing requirements of the plant, but all such changes will be reduced to a minimum. When changed from the regular operation to a new operation, the new operation shall become the regular operation, except when change is temporary. Temporary changes in work due to temporary situations in the plant will be handled as follows:

(a) If the regular work is available to the operator and he or she is nevertheless changed to other work, he or she shall receive not less than his or her average hourly earnings as determined below.

(b) If regular work is not available, the employer may assign to the operator to other work at the regular piece work rate. If the regular work becomes available, the operator shall be changed back to his or her regular work when he or she completes his or her bundles or thereafter shall receive hourly earnings as provided in (a).

For the purpose of this paragraph the average hourly earnings will be considered to be the operator's average hourly earnings on his or her regular work, not including overtime, for the twelve (12) weeks period prior to the transfer, or the lesser time as recorded if the operator has worked less than 12 weeks. In no event shall the earnings be less than seventy-five (75) cents per hour.

9. Vacations:

(a) Vacation Period—

It is mutually agreed that there shall be a vacation period of one week in each calendar year. The period for computation shall be the period ending with the last pay period in June in each year. The vacation period shall be the first week in July unless the Company and the Union shall mutually agree upon some other period. When the vacation period occurs during a week in which a paid holiday falls, employees now entitled to receive pay for such a holiday shall be paid for such holiday in addition to their vacation pay.

(b) Eligibility and Pay—

1. All employees who (1) have been on the payroll of the Company for at least nine (9) months prior to the commencement of the vacation period, and (2) are on such payroll at the commencement of the vacation period are eligible for a paid vacation as hereinafter provided.

2. The amount of each employee's vacation pay shall be determined in the manner set forth in this Paragraph. If the employee has been on the payroll of the Company:

(a) Nine (9) months, but less than one (1) year, and shall have worked for not less than 1,440 hours he shall receive three-fourths ($\frac{3}{4}$) of one (1) week's pay.

(b) One (1) year and less than four (4) years, and shall have worked for not less than 1,880 hours during the previous year, he shall receive one (1)

week's pay. If this employee worked less than 1,880 hours but more than 1,440 hours in the preceding one (1) year, he shall receive three-fourths ($\frac{3}{4}$) of one (1) week's pay.

(c) Four (4) years or more and worked not less than 1,880 hours during previous year, he shall receive two (2) weeks' pay, or less than 1440 hours one (1) week's pay.

3. For the purpose of determining vacation eligibility, both as to length of employment and hours worked, any period of unemployment due to lay off, illness, for which the Company may require proof, mutually agreed leave of absence, shall be considered as time worked.

4. In the case of time workers, one (1) week's pay shall be forty (40) times the worker's current hourly rate. In the case of piece workers, one (1) week's pay shall be forty (40) times the individual worker's straight time average hourly earnings for three (3) months preceding the commencement of the vacation week.

5. It is agreed that any employee who quits or is discharged for cause prior to the vacation period shall lose any right to vacation pay.

6. It is further agreed that failure on the part of any employee on lay-off to return to work when so recalled, unless unable to do so because of illness or reason mutually acceptable to the Company and the Union, shall constitute a quit on the part of the employee.

10. Leave of Absence:

(a) Reasonable leave of absence for a specific time, in writing, without pay may be granted an employee upon request for reasonable cause.

(b) Leave of absence shall not constitute a break in seniority.

11. Holidays:

(a) All regular employees under this Agreement shall receive pay for the following six (6) holidays, New Years Day, Decoration Day, 4th of July, Labor Day, Thanksgiving Day and Christmas Day, irrespective of the day of the week on which the holiday falls. In order to be eligible for a paid holiday, employees must work the last working day before the holiday and the first working day following the holiday. If the employee did not work either of these days due to illness or lay-off, he shall be entitled to holiday pay. In case of illness the Company may require proof of illness.

(b) In the case of time workers, the pay for each holiday shall be eight (8) times the employee's current straight time hourly rate. In the case of piece workers, pay for each holiday shall be eight (8) times the individual worker's straight time average hourly earnings.

12. Insurance:

(a) The Company agrees to contribute sums of money equal to a stated percentage of its payroll to the Amalgamated Insurance Fund, all as provided in the Supplemental Agreement annexed hereto; the terms and provisions of said Supplemental Agreement being specifically incorporated herein by reference.

(b) It is understood that the payment to the Insurance Fund shall be made on the payroll of all production employees, both members and potential members.

13. Equal Division of Work:

During slack seasons there shall be equal division of work among the employees within the departments. Transfer to other departments being based upon ability and efficiency of the workers to do the work.

14. Discharges and Grievance Procedure:

No employee covered by this Agreement shall be discharged without just cause. The Union shall present all complaints of alleged discharge without just cause to the Company within seven (7) days after the discharge. If no complaint is made within said seven (7) days the discharge will be conclusively deemed proper. All complaint, grievance or dispute arising between the parties relating directly or indirectly to the provision of this agreement whether concerning discharges or any other terms thereof shall in the first instance be taken up for adjustment by a representative of the Union and a representative of the Company. In the event that they are unable to adjust the same then such matters shall be submitted to arbitration the arbitrators to be selected as follows:

Each of the parties shall select one (1) arbitrator within two (2) working days after a request for arbitration is made by one party to the other, in writing. The said arbitrators so selected shall select a third arbitrator and if said arbitrators can not agree upon a third arbitrator within two (2) working days after

they have been selected then the third arbitrator shall be a person designated by the American Arbitration Association upon application by either party. It is understood that the decision of a majority of said arbitrators shall be final and binding upon the parties and both of the parties do hereby agree to conform to the majority decision of said arbitrators immediately upon being notified of the arbitration decision. The arbitrators selected by each of the parties shall not receive any compensation and the expense of the third arbitrator shall be shared and paid equally by the Company and the Union.

15. Strikes and Lockouts:

During the period of this Agreement there shall be no general lockout, general strike, individual shop strike, shop or union meetings called during working hours, or shop stoppage for any reason or cause whatsoever, and there shall be no individual lockout, strikes or stoppage pending the determination of any complaint or grievance.

Should there be a stoppage of work in the factory of the Employer, immediate notice thereof shall be given by the Employer to the Union. The latter obligates itself to return the workers to their work immediately upon notification of such stoppage. The consideration of stoppage and lockout cases shall have precedent over or shall be considered simultaneously with complaints or grievances.

16. Modification of Contract:

No individual member of the association or worker or group of workers shall have the right to modify or waive any part of this Agreement, it being understood

and agreed upon that this Agreement can be modified and waived only by mutual written consent of the Union and of the employer association.

In the event that there is any change or request for any change in the general level of wages including provisions relating to insurance or retirement in the cotton garment manufacturers industry either party may request a conference for the purpose of considering a change in rates under this Agreement and if the parties cannot agree within a reasonable time the matter shall be referred to arbitration as provided for any other grievance.

17. Other Factories:

During the term of this Agreement, the Company shall not, without the consent of the Union, directly or indirectly manufacture garments or cause them to be manufactured in any factory other than its own factories unless its employees in its own factories are first supplied with work.

18. Check Off:

The Company employee shall from either the first or second pay of each month deduct from the wages of its employees when authorized by the employees in writing, membership dues and initiation fees and assessments upon specific written authorization of the Union. The amounts deducted pursuant to such authorization shall be transmitted at monthly intervals to the Secretary-Treasurer of the Union, together with a list of the names of the employees from whom the deductions are made.

19. More Favorable Practices:

The Union agrees that the Employer is entitled to the same consideration and privileges, and that any terms and conditions more favorable than the above entered into with any other garment manufacturer shall be available to the Employer. If such more favorable conditions are permitted by the Agreement or otherwise, then the same conditions shall be available to the parties of the contract. The Union agrees to give information to the Association as to the terms given to others on request.

20. Reporting Pay:

If an employee is not notified on the previous day to the contrary, and reports for work, such employee shall receive not less than four (4) hours pay, at the rate of their average hourly earnings.

21. Union Responsibility:

The Union and its officers shall not be liable to the Employer for unlawful acts of persons other than officers, agents or employees of the Union unless such unlawful acts were in some way participated in by the Union or ratified by the Union after actual knowledge thereof.

22. Legality:

In the event that any clause, provision or agreement contained in this Agreement is in violation of any State, Federal or other law, such clause, provision or agreement shall be null and void.

23. Term of Agreement:

This Agreement shall be effective upon the date hereof and shall remain in full force and effect until

September 30th, 1956. It shall be automatically renewed from year to year thereafter unless sixty (60) days prior to the expiration of this Agreement or of any renewal thereof, notice in writing by registered mail is given by either party to the other of its desire to propose changes in the Agreement or of intention to terminate the same, in which event this Agreement shall terminate upon the expiration date next following said notice.

In Witness Whereof, the parties hereto have caused this Agreement to be executed by their duly authorized agents on the day and year hereinabove first written.

Amalgamated Group of the Pacific
Coast Garment Manufacturers

By.....

California Ranchwear

/s/ By [Illegible]

Cal-Made Manufacturing Co.

/s/ By [Illegible]

Duke of Hollywood

/s/ By [Illegible]

Fisch & Co.

/s/ By [Illegible]

Grunwald-Marx

/s/ By Stanley Taylor

Hollywood Rogue Sportswear Corp.

/s/ By W. J. Rodman

Maler Manufacturing Co.

/s/ By J. Maler,

Pacific Mfg. Company

/s/ By [Illegible]

Los Angeles Joint Board Amalgamated

Clothing Workers of America

/s/ By Jerome Posner

Exhibit B

AGREEMENT

This Agreement made this 23 day of October, 1956, by and between Grunwald-Marx Inc. (hereinafter referred to as the "Company"), and the Los Angeles Joint Board, Amalgamated Clothing Workers of America (hereinafter referred to as the "Union"):

It Is Understood and Agreed that there is an agreement in force and effect dated on or about the 1st day of October, 1953, and which is due to expire on the 30th day of September, 1956, and it is the desire of the Company and those of the individual members who have executed this agreement that the agreement be extended to September 30, 1959, and that all of the terms and conditions of said agreement be deemed a part of this agreement except as herein specifically set forth.

It Is Understood that anything contained in this agreement different from that which is contained in the agreement dated on or about the 1st day of October, 1953, shall supersede the provisions thereof.

It Is Understood and Agreed that this agreement shall only be binding upon the Companies who affix their signature to this agreement.

It Is Understood and Agreed that the provisions of paragraph No. 9, with the heading "Vacations" shall be revised in the following respects:

Subparagraph 2(b) shall read as follows:

"(b) One (1) year and less than three (3) years, and shall have worked for not less than 1,880 hours

during the previous year, he shall receive one (1) week's pay. If this employee worked less than 1,880 hours but more than 1,440 hours during the preceding one (1) year, he shall receive three-fourths ($\frac{3}{4}$) of one (1) week's pay."

Subparagraph 2(c) shall read as follows:

"(c) Three (3) years or more and worked not less than 1,880 hours during the previous year, he shall receive two (2) weeks' pay, and in the event he has worked not less than 1,440 hours, one (1) week's pay.

It Is Further Understood and Agreed that all of the provisions except as herein changed of the contract dated on or about October 1, 1953, are incorporated into this contract by reference and shall be deemed a part thereof as though herein fully set forth.

Los Angeles Joint Board Amalgamated
Clothing Workers of America

/s/ By J. Posner,
Grunwald-Marx Inc.

/s/ By [Illegible]

Exhibit C

Grunwald & Marx

Office of the President, Fred Grunwald

November 21, 1956

Mr. Jerome Posner
Los Angeles Joint Board
Amalgamated Clothing Workers of America
2501 South Hill Street
Los Angeles 7, California

Dear Mr. Posner:

After having carefully studied your proposed new contract dated October 1, 1956, I prefer to let the matter stand with the agreement which we signed when you were in my office and which extends the term of the old contract of October 1, 1953 to September 30, 1959.

This also confirms our understanding that the old contract dated October 1, 1956, as extended to September 30, 1959, covers only employees in the Los Angeles and Long Beach plants of the company.

Very truly yours,

Grunwald-Marx, Inc.

/s/ By [Illegible]

Fred Grunwald

President

FG/bs

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Dec. 9, 1960.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes now defendant, Grunwald-Marx, Inc., and for answer to the amended complaint herein admits, denies and alleges as follows:

I.

Answering paragraph II of the amended complaint, this answering defendant denies that defendant maintains a manufacturing plant in the City of Los Angeles, State of California. Except as herein denied, this answering defendant admits the allegations of paragraph II of the amended complaint.

II.

Answering paragraphs III, IX, X and XI of the amended complaint, this answering defendant denies, generally and specifically, each and all of the allegations therein contained.

III.

This answering defendant admits the allegations of paragraphs I, IV, V, VI, VII and VIII of the amended complaint.

For a First Affirmative Defense, Defendant Alleges:

On or about October 6, 1959, plaintiff filed a third amended petition to compel arbitration of the subject matter and claims set forth in the instant amended complaint in the Los Angeles Superior Court, being case No. 689,026 (The original petition was filed October 27, 1957.). A certified copy of the Third Amended Petition is attached to the Answer to the Complaint on file herein, marked Exhibit "A", and incorporated herein.

A certified copy of defendant's Amended Answer to plaintiff's Third Amended Petition is attached to the Answer to the Complaint on file herein, marked Exhibit "B", and incorporated herein.

Trial of the issues was held in the Los Angeles Superior Court and on May 16, 1960, Judge Clarke E. Stephens entered his findings of fact and conclusions of law. A certified copy of the Court's Findings of Fact and Conclusions of Law is attached to the Answer to the Complaint on file herein, marked Exhibit "C" and incorporated herein.

On May 16, 1960, Judge Clarke E. Stephens entered his judgment and order denying arbitration and dismissing the proceedings. A certified copy of the Court's Judgment and Order is attached to the Answer to the Complaint on file herein, marked Exhibit "D", and incorporated herein.

On or about June 10, 1960, plaintiff filed an appeal from the judgment and order denying arbitration in the District Court of Appeal. On December 29, 1960, the District Court of Appeal of the State of California affirmed the order of Judge Clarke E. Stephens denying arbitration, being District Court of Appeal Civil No. 24968.

By virtue of the prior action aforesaid, plaintiff is barred from prosecuting this action in the Federal District Court under federal law, and this action should be abated.

For a Second, Separate and Further Defense, Defendant Alleges:

Defendant repeats and repleads the allegations of the first affirmative defense and incorporates them herein by reference.

Plaintiff has made an election of remedies in filing the said petition in the Los Angeles Superior Court for specific performance to compel arbitration of the said subject matter and said claims and is thereby barred from prosecuting the instant action.

For a Third, Separate and Further Defense, Defendant Alleges:

Defendant repeats and repleads the allegations of the first affirmative defense and incorporates them herein by reference.

By virtue of the prior action aforesaid, plaintiff is estopped from prosecuting the instant action.

For a Fourth, Separate and Further Defense, Defendant Alleges:

Defendant repeats and repleads the allegations of the first affirmative defense and incorporates them herein by reference.

There has been an unreasonable delay of three and one-half years on the part of plaintiff in requesting arbitration of matters set forth in the amended complaint, and plaintiff is estopped from now demanding arbitration of said matters.

For a Fifth, Separate and Further Defense, Defendant Alleges:

Plaintiff has no power or legal capacity to demand or compel arbitration of wage claims for individual employees, since claims for wages are a uniquely personal

right to each individual employee arising out of contracts of hire which are separate and apart from the collective bargaining agreement.

Wherefore, defendant prays judgment that plaintiff take nothing by its amended complaint, for costs of suit herein, and such other relief as the Court may deem just and proper.

HILL, FARRER & BURRILL,
/s/ RAY L. JOHNSON, Jr.,
Attorneys for Defendant.

Exhibit A

Wirin, Rissman & Okrand
257 South Spring Street
Los Angeles 12, California
Telephone: MAdison 4-9708
Attorneys for Petitioner

Filed, Oct. 6, 1959.

Harold L. Ostly, County Clerk.

/s/ By C. Krongold.

In the Superior Court of the State of California,
in and for the County of Los Angeles.

No. 689 026

In the Matter of

THE PETITION OF JEROME POSNER, MAN-
AGER OF LOS ANGELES JOINT BOARD,
AMALGAMATED CLOTHING WORKERS
OF AMERICA, For an Order directing Arbitra-
tion.

THIRD AMENDED PETITION FOR ORDER
DIRECTING ARBITRATION

To the Honorable Superior Court of the State of California in and for the County of Los Angeles:

The Third Amended Petition of Jerome Posner, hereinafter called the Petitioner, filed pursuant to Court Order, respectfully shows that:

I

Los Angeles Joint Board, Amalgamated Clothing Workers of America, hereinafter referred to as the Union, is a voluntary unincorporated association, consisting of thousands of members, a number of whom were employed by Grunwald-Marx, Inc., a California Corporation, sometimes hereinafter called the Company. The Union has its place of business in the County of Los Angeles, State of California and within the jurisdiction of this Court.

II

Grunwald-Marx, Inc. is a corporation duly organized and existing under the laws of the State of California having its place of business in the City and County of Los Angeles, State of California. That prior to May 30, 1957, the Company owned and operated shirt manufacturing plants in the City of Los Angeles and the City of Long Beach, County of Los Angeles, State of California.

III

Petitioner Jerome Posner is the manager and a member of the Los Angeles Joint Board, Amalgamated Clothing Workers of America. He brings this action on behalf of himself and in a representative capacity on

behalf of all members of the Union. The cause of action herein is one of common and general interest to said Union and to the members thereof, all of whom are parties aggrieved by the failure and refusal of the Company as will hereinafter be set forth. Said members are too numerous and it is impracticable to bring them all before this Court.

IV

On the first day of October, 1953, the Union and the Company entered into a written collective bargaining agreement, covering wages, hours and working conditions of the Company's employees and in which the Company recognized the Union as the exclusive bargaining representative of the Company's employees. A copy of said collective bargaining agreement is referred to herewith and incorporated herein and made a part hereof as though fully set forth, and is marked Exhibit "A". On or about October 23, 1956, the Union and the Company entered into an Agreement acknowledging the continued existence of the Agreement of October 1, 1953, and extending said latter Agreement of October 1, 1953, to September 30, 1959. A copy of said Agreement of October 23, 1956 is referred to herewith and incorporated herein and made a part hereof as though fully set forth, and is marked Exhibit "A-1". The said Agreements of October 1, 1953 (Exhibit A hereof) and of October 23, 1956 (Exhibit A-1 hereof) are now in full force and effect, were in full force and effect at the time the dispute between the parties arose, as is more specifically alleged hereafter, and have been in full force and effect at all times since said dispute arose.

V

Article 14 of said collective bargaining agreement (Exhibit A) provides for the settlement by arbitration of all complaints, grievances or disputes arising between the parties relating directly or indirectly under the provisions of the agreement or the refusal of either party to perform the whole or any part thereof.

VI

A controversy and dispute has arisen out of said contract which has in the first instance been taken up for adjustment by a representative of the Union and a representative of the Company, which said representatives have been unable to adjust or resolve. The matters in dispute have arisen and now exist as a result of the following: On or about May 29, 1957, the Company moved its operations from its manufacturing plants located in the County of Los Angeles, State of California to the City of Phoenix in the State of Arizona. The Company "terminated" its employees in its California operations. Article 9 of the contract provides that all employees who have been on the payroll of the Company for at least nine (9) months prior to the vacation period and are on such payroll at the commencement of the vacation period, are eligible for a paid vacation. Article 11 of the agreement provides that employees shall receive pay for six (6) holidays, among which is Decoration Day.

VII

At the time the Company moved its operations from its manufacturing plant located in the County of Los Angeles, as aforesaid, there were on the payroll of said

Company employees who had been on the payroll of said Company for at least nine months prior to the moving of said plant. Petitioner is informed and believes and thereon states that there were approximately one hundred and seventy-five (175) employees on the payroll of said Company for at least nine months prior to the moving of the plant, but that the exact number and the names of said employees are at this time unknown to petitioner, but are within the special knowledge of the Company; and that such information will be found in the books and records of said Company. That said employees would have been on the payroll at the commencement of the vacation period had not the Company moved its manufacturing plant, as aforesaid, prior to the commencement of the vacation period, the Company has failed and refused to pay said employees their vacation pay.

VIII

That because the Company moved its plant, as aforesaid, on May 29, 1957, the employees on the payroll at that time, and who worked during that week, were not paid for the holiday of Decoration Day, on May 30, 1957, and the Company refused and failed to pay holiday pay for said holiday. Petitioner does not know the exact number and names of said employees entitled to said holiday pay, but is informed and believes and thereon alleges that such information is within the special knowledge of the Company and contained in its books and records.

IX

The Company has refused and failed to pay vacation pay and holiday pay to the employees who were em-

ployed at the California plants up to the date of the closing of said plants. Following the closing of the plants, the Union made demand upon the Company for the vacation and holiday pay. The Company refused to make such payment. On July 11, 1957, the Union wrote to the Company stating its request that this dispute be submitted to arbitration. A copy of said letter is attached hereto and made a part hereof and incorporated herein as though fully set forth and is marked Exhibit "B". Following receipt of this letter by the Company, a series of letters were transmitted between the Company and the Union, all of which are incorporated herein and made a part hereof as though fully set out and attached hereto as follows: letter of July 19, 1957 from the Company to the Union—Exhibit "C"; letter of July 22, 1957 from the Union to the Company—Exhibit "D"; letter of July 26, 1957 from the Company to the Union—Exhibit "E"; letter of July 26, 1957 from the Union to the Company in which the Union renews its request for arbitration—Exhibit "F"; letter of August 5, 1957 from the Company to the Union in which the Company refuses to enter into an arbitration—Exhibit "G"; letter of August 6, 1957 from the Union to the Company in which the Union again renews its demand for arbitration—Exhibit "H"; letter of August 12, 1957 from the Company to the Union—Exhibit "I"; letter of August 30, 1957 from the Union to the Company—Exhibit "J"; letter of September 16, 1957 from the Company to the Union—Exhibit "K"; letter of September 17, 1957 from the Union to the Company again requesting that the matter of the interpretation of the agreement be

submitted to arbitration—Exhibit “L”; letter of September 25, 1957 from the Company to the Union setting up its interpretation of the Agreement—Exhibit “M”.

X

Petitioner states that a dispute now exists and has existed, as alleged above, between the Company and the Union as to the interpretation and meaning of the vacation clause and holiday clause of the collective bargaining agreement and whether or not the Company is required under the terms of the agreement to pay vacation pay and holiday pay for Decoration Day, May 30, 1957, to its employees, and which employees are entitled to such payments.

XI

The Petitioner and the Company dispute the interpretation and meaning to be given Article 9(b) of the collective bargaining agreement, which concerns vacation eligibility, over whether employees who “have been on the payroll of the Company for at least nine (9) months prior to the commencement of the vacation period” must also be “on such payroll at the commencement of the vacation period” to be eligible for a paid vacation, where the employees are prevented from being on the payroll at the commencement of the vacation period because the Company has closed its plant just prior to the commencement of the vacation period. Petitioner and the Company further dispute the interpretation and meaning to be given Article 11(a) of the collective bargaining agreement, which provides for holiday pay, over whether employees, to be eligible for

holiday pay, "must work the last working day before the holiday and the first working day following the holiday", where they are prevented from doing so by the Company's closing of its plant prior to those days, but after the employees have worked during the week within which the holiday falls.

XII

Petitioner contends that the Company is required to pay vacation pay to all employees covered by the aforesaid collective bargaining agreement who were in the employ of the Company for nine (9) months or more as of the time of the closing of the plant; and that the Company is required to pay holiday pay for Decoration Day, May 30, 1957, to all employees who worked during the week in which that holiday fell, but who were prevented from working on the last working day before and the first working day after because the Company closed its plant. The Company disputes the contention of the Petitioner and contends it is not required to make such payments.

XIII

This dispute has been taken up for adjustment between a representative of the Company and a representative of the Union, and the said representatives have not been able to adjust or resolve said dispute. The Union has requested the Company in writing to proceed with arbitration in said controversy in the manner provided in the written agreement, but the Company has refused and still refuses to submit the matter to arbitration.

XIV

The Union has at all times done and performed all of the stipulations, agreements and conditions stated in said collective bargaining agreement to be performed on its part.

Wherefore, Petitioner prays that this Court issue its Order directing that an arbitration proceed in a manner provided for in the written collective bargaining agreement on the questions of the vacation and holiday pay for all persons on the payroll of the Company prior to the closing of its plants in the County of Los Angeles, State of California, and for such other and further relief as the Court may deem proper.

Dated this 5th day of October, 1959.

WIRIN, RISSMAN & OKRAND
/s/ By ROBERT R. RISSMAN,
Attorneys for Petitioner.

Exhibit A

AGREEMENT

Agreement made this 1st day of October, 1953, by and between the Amalgamated Group of the Pacific Coast Garment Manufacturers (hereinafter referred to as the "Association") and the individual members thereof signatory hereto (referred to as the Company) and the Los Angeles Joint Board, Amalgamated Clothing Workers of America (hereinafter referred to as the "Union").

It is the intent and purpose of the Company and the Union that this Agreement shall promote and improve industrial and economic relationships between the Company and its employees, and provide for wages, hours of work and conditions of employment of the employees of the Company. It is expected that the respective representatives of both parties to this Agreement shall represent in the factory and in their dealings the cooperative spirit of the Agreement and shall be leaders in promoting that amity and spirit of good will which is the purpose of this instrument to establish.

Now, Therefore, in consideration of the mutual covenants, promises and agreements herein contained, the parties hereto agree as follows:

1. Coverage:

The term "employee" as used in this Agreement shall include all of the employees of the Company, except executive, administrative and supervisory employees, office clerical employees, salesmen, designers, receiving and shipping, guards and watchmen (even though they may have maintenance and janitorial duties).

2. Union Recognition:

The Company recognizes the Union as the exclusive bargaining representative of its employees with reference to wages, hours and working conditions.

3. Union Security:

(a) There shall be a trial period of 30 working days for all new employees after commencement of their employment. Employees on a trial period at the time of the execution of this Agreement shall not lose time

already spent on trial. The employment of any employee on trial may be terminated without resort to the grievance procedure. If any employee is continued in the employ of the Company after the end of the trial period as above described he shall become a regular employee entitled to all the benefits of this Agreement.

(b) Membership in the Union on and after the 30th working day following the beginning of employment for each employee or following the effective date of this Agreement, whichever is later, shall be required as a condition of employment of each employee.

(c) All employees who are now members or hereafter become members of the Union shall, as a condition of continued employment, remain members in good standing during the term of this Agreement.

(d) The employment office maintained by the Union shall be made available to both members and non-members of the Union. The Union warrants that in the operation of such an office and in referrals to the Employer, it shall not discriminate against any individual applicant because of non-membership in the Union. The Employer agrees that in the event he shall require additional employees, he shall hire such additional employees from the aforesaid employment office. In the event that the aforesaid employment office is unable to supply the requested employees within 48 hours following the request, the Employer shall be free to hire such additional employees in the open market.

4. Union Representatives:

(a) The Company shall recognize and deal with such representatives as the Union may elect or appoint

and shall permit the duly accredited representatives of the Union to visit the Company's factories at reasonable times mutually agreeable.

(b) The Company will provide a bulletin board space for the posting of Union notices and bulletins pertaining to working conditions under this contract.

(c) The Company agrees to make available to the Union such payroll and production records as is reasonably necessary to be inspected in connection with the terms hereof. Such records as are made available to the Union shall be confidential.

5. Hours of Work:

The regular work week shall be forty (40) hours, five days per week from Monday to Friday inclusive of not more than eight (8) hours in one day. All worked performed in excess of eight (8) hours each day or forty (40) hours each week and all work performed on Saturday shall constitute overtime and shall be paid for at the rate of time and one half, except where employee has been absent on his own account or for just cause, then Saturday may be worked at regular time. All work performed on Sunday and holidays shall be paid for at double time, in addition to the regular pay for such holiday.

6. New Piece Work Rates:

In the event that any of the existing operations of the Company are changed or new operations are added, piece rates for such operations shall be mutually agreed upon between the Union and the Company, and shall become effective at the time that the operation is changed or new operation begun.

7. Apprentices:

The employer shall have the right to employ apprentices in all crafts, provided, however, that the term of apprenticeship and wage scales for such apprentice shall be agreed upon between the Union and the Employer.

8. Work Changes:

Operators' work may be changed as required to meet changing requirements of the plant, but all such changes will be reduced to a minimum. When changed from the regular operation to a new operation, the new operation shall become the regular operation, except when change is temporary. Temporary changes in work due to temporary situations in the plant will be handled as follows:

(a) If the regular work is available to the operator and he or she is nevertheless changed to other work, he or she shall receive not less than his or her average hourly earnings as determined below.

(b) If regular work is not available, the employer may assign to the operator to other work at the regular piece work rate. If the regular work becomes available, the operator shall be changed back to his or her regular work when he or she completes his or her bundles or thereafter shall receive hourly earnings as provided in (a).

For the purpose of this paragraph the average hourly earnings will be considered to be the operator's average hourly earnings on his or her regular work, not including overtime, for the twelve (12) weeks period prior to the transfer, or the lesser time as recorded if the

operator has worked less than 12 weeks. In no event shall the earnings be less than seventy-five (75) cents per hour.

9. Vacations:

(a) Vacation Period—

It is mutually agreed that there shall be a vacation period of one week in each calendar year. The period for computation shall be the period ending with the last pay period in June in each year. The vacation period shall be the first week in July unless the Company and the Union shall mutually agree upon some other period. When the vacation period occurs during a week in which a paid holiday falls, employees now entitled to receive pay for such a holiday shall be paid for such holiday in addition to their vacation pay.

(b) Eligibility and Pay—

1. All employees who (1) have been on the payroll of the Company for at least nine (9) months prior to the commencement of the vacation period, and (2) are on such payroll at the commencement of the vacation period are eligible for a paid vacation as hereinafter provided.

2. The amount of each employee's vacation pay shall be determined in the manner set forth in this Paragraph. If the employee has been on the payroll of the Company:

(a) Nine (9) months, but less than one (1) year, and shall have worked for not less than 1,440 hours he shall receive three-fourths ($\frac{3}{4}$) of one (1) week's pay.

(b) One (1) year and less than four (4) years, and shall have worked for not less than 1,880 hours during the previous year, he shall receive one (1) week's pay. If this employee worked less than 1,880 hours but more than 1,440 hours in the preceding one (1) year, he shall receive three-fourths ($\frac{3}{4}$) of one (1) week's pay.

(c) Four (4) years or more and worked not less than 1,880 hours during previous year, he shall receive two (2) weeks' pay, or less than 1,440 hours one (1) week's pay.

3. For the purpose of determining vacation eligibility, both as to length of employment and hours worked, any period of unemployment due to lay off, illness, for which the Company may require proof, mutually agreed leave of absence, shall be considered as time worked.

4. In the case of time workers, one (1) week's pay shall be forty (40) times the worker's current hourly rate. In the case of piece workers, one (1) week's pay shall be forty (40) times the individual worker's straight time average hourly earnings for three (3) months preceding the commencement of the vacation week.

5. It is agreed that any employee who quits or is discharged for cause prior to the vacation period shall lose any right to vacation pay.

6. It is further agreed that failure on the part of any employee on lay-off to return to work when so recalled, unless unable to do so because of illness or reason mutually acceptable to the Company and the Union, shall constitute a quit on the part of the employee.

10. Leave of Absence:

(a) Reasonable leave of absence for a specific time, in writing, without pay may be granted an employee upon request for reasonable cause.

(b) Leave of absence shall not constitute a break in seniority.

11. Holidays:

(a) All regular employees under this Agreement shall receive pay for the following six (6) holidays, New Years Day, Decoration Day, 4th of July, Labor Day, Thanksgiving Day and Christmas Day, irrespective of the day of the week on which the holiday falls. In order to be eligible for a paid holiday, employees must work the last working day before the holiday and the first working day following the holiday. If the employee did not work either of these days due to illness or lay-off, he shall be entitled to holiday pay. In case of illness the Company may require proof of illness.

(b) In the case of time workers, the pay for each holiday shall be eight (8) times the employee's current straight time hourly rate. In the case of piece workers, pay for each holiday shall be eight (8) times the individual worker's straight time average hourly earnings.

12. Insurance:

(a) The Company agrees to contribute sums of money equal to a stated percentage of its payroll to the Amalgamated Insurance Fund, all as provided in the Supplemental Agreement annexed hereto; the terms and provisions of said Supplemental Agreement being specifically incorporated herein by reference.

(b) It is understood that the payment to the Insurance Fund shall be made on the payroll of all production employees, both members and potential members.

13. Equal Division of Work:

During slack seasons there shall be equal division of work among the employees within the departments. Transfer to other departments being based upon ability and efficiency of the workers to do the work.

14. Discharges and Grievance Procedure:

No employee covered by this Agreement shall be discharged without just cause. The Union shall present all complaints of alleged discharge without just cause to the Company within seven (7) days after the discharge. If no complaint is made within said seven (7) days the discharge will be conclusively deemed proper. All complaint, grievance or dispute arising between the parties relating directly or indirectly to the provision of this agreement whether concerning discharges or any other terms thereof shall in the first instance be taken up for adjustment by a representative of the Union and a representative of the Company. In the event that they are unable to adjust the same then such matters shall be submitted to arbitration the arbitrators to be selected as follows:

Each of the parties shall select one (1) arbitrator within two (2) working days after a request for arbitration is made by one party to the other, in writing. The said arbitrators so selected shall select a third arbitrator and if said arbitrators can not agree upon a third arbitrator within two (2) working days after they have been selected then the third arbitrator shall be a

person designated by the American Arbitration Association upon application by either party. It is understood that the decision of a majority of said arbitrators shall be final and binding upon the parties and both of the parties do hereby agree to conform to the majority decision of said arbitrators immediately upon being notified of the arbitration decision. The arbitrators selected by each of the parties shall not receive any compensation and the expense of the third arbitrator shall be shared and paid equally by the Company and the Union.

15. Strikes and Lockouts:

During the period of this Agreement there shall be no general lookout, general strike, individual shop strike, shop or union meetings called during working hours, or shop stoppage for any reason or cause whatsoever, and there shall be no individual lookout, strikes or stoppage pending the determination of any complaint or grievance.

Should there be a stoppage of work in the factory of the Employer, immediate notice thereof shall be given by the Employer to the Union. The latter obligates itself to return the workers to their work immediately upon notification of such stoppage. The consideration of stoppage and lockout cases shall have precedent over or shall be considered simultaneously with complaints or grievances.

16. Modification of Contract:

No individual member of the association or worker or group of workers shall have the right to modify or waive any part of this Agreement, it being under-

stood and agreed upon that this Agreement can be modified and waived only by mutual written consent of the Union and of the employer association.

In the event that there is any change or request for any change in the general level of wages including provisions relating to insurance or retirement in the cotton garment manufacturers industry either party may request a conference for the purpose of considering a change in rates under this Agreement and if the parties cannot agree within a reasonable time the matter shall be referred to arbitration as provided for any other grievance.

17. Other Factories:

During the term of this Agreement, the Company shall not, without the consent of the Union, directly or indirectly manufacture garments or cause them to be manufactured in any factory other than in its own factories unless its employees in its own factories are first supplied with work.

18. Check Off:

The Company shall from either the first or second pay of each month deduct from the wages of its employees when authorized by the employees in writing, membership dues and initiation fees and assessments upon specific written authorization of the Union. The amounts deducted pursuant to such authorization shall be transmitted at monthly intervals to the Secretary-Treasurer of the Union, together with a list of the names of the employees from whom the deductions are made.

19. More Favorable Practices:

The Union agrees that the Employer is entitled to the same consideration and privileges, and that any terms and conditions more favorable than the above entered into with any other garment manufacturer shall be available to the Employer. If such more favorable conditions are permitted by the Agreement or otherwise, then the same conditions shall be available to the parties of the contract. The Union agrees to give information to the Association as to the terms given to others on request.

20. Reporting Pay:

If an employee is not notified on the previous day to the contrary, and reports for work, such employee shall receive not less than four (4) hours pay, at the rate of their average hourly earnings.

21. Union Responsibility:

The Union and its officers shall not be liable to the Employer for unlawful acts of persons other than officers, agents or employees of the Union unless such unlawful acts were in some way participated in by the Union or ratified by the Union after actual knowledge thereof.

In the event that any clause, provision or agreement contained in this Agreement is in violation of any State, Federal or other law, such clause, provision or agreement shall be null and void.

23. Term of Agreement:

This Agreement shall be effective upon the date thereof and shall remain in full force and effect until September 30th, 1956. It shall be automatically renewed from year to year thereafter unless sixty (60)

days prior to the expiration of this Agreement or of any renewal thereof, notice in writing by registered mail is given by either party to the other of its desire to propose changes in the Agreement or of intention to terminate the same, in which event this Agreement shall terminate upon the expiration date next following said notice.

In Witness Whereof, the parties hereto have caused this Agreement to be executed by their duly authorized agents on the day and year hereinabove first written.

Los Angeles Joint Board Amalgamated
Clothing Workers of America

/s/ By Jerome Posner

Amalgamated Group of the
Pacific Coast Garment
Manufacturers

By

California Ranchwear

/s/ By [Illegible]

Cal-Made Manufacturing Co.

/s/ By Herbert Kaufman

Duke of Hollywood

/s/ By Monty Freed

Fisch & Co.

/s/ By [Illegible]

Grunwald-Marx

/s/ By Stanley Talpin

Hollywood Rogue

Sportswear Corp.

/s/ By [Illegible]

Maler Manufacturing Co.

/s/ By J. Maler

Pacific Mfg. Company

/s/ By [Illegible]

Exhibit A-1

A G R E E M E N T

This Agreement made this 23rd day of October, 1956, by and between Grunwald-Marx Inc. (hereinafter referred to as the "Company"), and the Los Angeles Joint Board, Amalgamated Clothing Workers of America (hereinafter referred to as the "Union"):

It is Understood and Agreed that there is an agreement in force and effect dated on or about the 1st day of October, 1953, and which is due to expire on the 30th day of September, 1956, and it is the desire of the Company and those of the individual members who have executed this agreement that the agreement be extended to September 30, 1959, and that all of the terms and conditions of said agreement be deemed a part of this agreement except as herein specifically set forth.

It Is Understood that anything contained in this agreement different from that which is contained in the agreement dated on or about the 1st day of October, 1953, shall supersede the provisions thereof.

It Is Understood and Agreed that this agreement shall only be binding upon the Companies who affix their signature to this agreement.

It Is Understood and Agreed that the provisions of paragraph No. 9, with the heading "Vacations" shall be revised in the following respects:

Subparagraph 2(b) shall read as follows:

"(b) One (1) year and less than three (3) years, and shall have worked for not less than 1,880 hours

during the previous year, he shall receive one (1) week's pay. If this employee worked less than 1,880 hours but more than 1,440 hours during the preceding one (1) year, he shall receive three-fourths ($\frac{3}{4}$) of one (1) week's pay."

Subparagraph 2(c) shall read as follows:

"(c) Three (3) years or more and worked not less than 1,880 hours during the previous year, he shall receive two (2) weeks' pay, and in the event he has worked not less than 1,440 hours, one (1) week's pay.

It Is Further Understood and Agreed that all of the provisions except as herein changed of the contract dated on or about October 1, 1953, are incorporated into this contract by reference and shall be deemed a part thereof as though herein fully set forth.

Grunwald-Marx Inc.

/s/ By [Illegible]

Los Angeles Joint Board
Amalgamated Clothing
Workers of America

/s/ J. Posner

In the Matter of the Petition of Perome Posner, etc.
State of California, County of Los Angeles—ss. No.
689026

I, Harold J. Ostly, County Clerk and Clerk of the Superior Court within and for the county and state aforesaid, do hereby certify the foregoing to be a correct copy of the original Third Amended Petition for Order Directing Arbitration (including Exhibits marked "A" and "A-1" attached thereto) filed October 6, 1959,

on file and of record in my office, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Superior Court this 24th day of October 1960.

[Seal]

HAROLD J. OSTLY, County Clerk
and Clerk of the Superior Court of
the State of California, in and for
the County of Los Angeles
/s/ By S. Gahagan, Deputy.

Exhibit B

Hill, Farrer & Burrill
411 West Fifth Street
Los Angeles 13, California
Telephone: Madison 6-0581
Attorneys for Respondent

Filed Feb 5 1960

In the Superior Court of the State of California
in and for the County of of Los Angeles

No. 689,026

In the Matter of

THE PETITION OF JEROME POSNER, MAN-
AGER OF LOS ANGELES JOINT BOARD,
AMALGAMATED CLOTHING WORKERS
OF AMERICA,

for an Order Directing Arbitration.

AMENDED ANSWER TO THIRD AMENDED
PETITION FOR ORDER DIRECTING AR-
BITRATION

Comes Now the respondent, Grunwald-Marx, Inc., a California corporation, and answering the petition on file herein for itself alone, and no other, admits, denies and alleges as follows:

I.

Answering paragraphs I and III of the third amended petition, respondent does not have sufficient information or belief upon which to base an answer and on this ground denies, generally and specifically, each and all of the allegations therein contained.

II.

Answering paragraphs V and VI of the third amended petition, respondent denies, generally and specifically, each and all of the allegations therein contained except that respondent admits that on or about April 5 to May 24, 1957, the company moved its operations from its plant located in the County of Los Angeles, State of California, to the City of Phoenix, in the State of Arizona, and terminated its employees in its California plant.

III.

Answering paragraph VII of the third amended petition, respondent admits that at the time the company moved its operations to Phoenix, Arizona, there were on the payroll of respondent employees who had been on the payroll of respondent for nine months prior to moving of said plant. Except as herein admitted, respondent denies, generally and specifically, each and all of

the allegations contained in paragraph VII, and, in particular, respondent denies that the exact number and names of the employees are known to respondent and that respondent has books and records showing the exact number and names of the employees so employed.

IV.

Answering paragraphs VIII of the third amended petition, respondent denies, generally, and specifically, each and all of the allegations therein contained.

V.

Answering paragraph IX of the third amended petition, respondent admits the allegations therein contained except that respondent denies, generally and specifically, that following the closing of the plant, the union made demand upon respondent for vacation and holiday pay.

VI.

Answering paragraph XI of the third amended petition, respondent denies, generally and specifically, each and all of the allegations therein contained.

VII.

Answering paragraph XIII. of the third amended petition, respondent admits that the union has requested the company, in writing, to proceed with arbitration and that respondent has refused to submit the matter to arbitration. Except as herein admitted, respondent denies, generally and specifically, each and all of the allegations contained in paragraph XIII.

VIII.

Answering paragraph XIV of the third amended petition, respondent denies, generally and specifically, each and all of the allegations therein contained.

For a First Affirmative Defense, Respondent Alleges:

The petition fails to state facts sufficient to constitute a cause of action in that it fails to allege that the company acted illegally, arbitrarily or in bad faith in discharging its employees before the employees were eligible for vacation pay.

For a Second, Separate and Further Defense,
Respondent Alleges:

That the court lack jurisdiction over the parties to, and subject matter of, this action for the reason that respondent is engaged in interstate commerce by virtue of the fact that it ships in excess of \$50,000.00 worth of goods and materials from its plant in Phoenix, Arizona, to places outside the State of Arizona, and exclusive jurisdiction is in the National Labor Relations Board pursuant to the provisions of sections 7 through 10, inclusive, of the National Labor Relations Act, as amended, since the conduct alleged in the petition may reasonably be deemed to constitute an unfair labor practice or is protected activity under said Act.

For a Third, Separate and Further Defense,
Respondent Alleges:

That this Court has no jurisdiction either of the persons or subject matter of this action for the reason that petitioner has no jurisdiction, power or legal standing to compel arbitration, where the purpose thereof is to seek to recover wages for individual members of the union. In this connection respondent alleges that on or about February 1, 1960, eleven former employes of respondent filed a complaint with the Department of

Industrial Relations in an attempt to recover wages due for vacation pay from June, 1956 to June, 1957. This is the same claim which is now the basis for petitioner's demand for arbitration in this action. Respondent further alleges that the wage claims for vacation pay of the aforesaid eleven former employees has been assigned in writing to the Division of Labor Law Enforcement for collection. Respondent attaches hereto, and incorporates herein, as Exhibit "A" the said notice of filing claims with the Department of Industrial Relations. Respondent alleges that respondent will incur not less than \$1,000.00 in attorneys' fees in defending the aforesaid claim before the Division of Labor Law Enforcement.

For a Fourth, Separate and Further Defense,
Respondent Alleges:

Petitioner has no jurisdiction, power or legal standing to bring a class action as representative of respondent's former employees to recover wages for each of the said employees. In this connection respondent alleges that on or about February 1, 1960, eleven former employees of respondent filed a complaint with the Department of Industrial Relations in an attempt to recover wages due for vacation pay from June, 1956 to June, 1957. This is the same claim which is now the basis for petitioner's demand for arbitration in this action. Respondent further alleges that the wage claims for vacation pay of the aforesaid eleven former employees has been assigned in writing to the Division of Labor Law Enforcement for collection. Respondent attaches hereto, and incorporates herein, as Exhibit "A"

the said notice of filing claims with the Department of Industrial Relations. Respondent alleges that respondent will incur not less than \$1,000.00 in attorneys' fees in defending the aforesaid claim before the Division of Labor Law Enforcement.

For a Fifth Separate and Further Defense,
Respondent Alleges:

That respondent is not in default in proceeding to arbitrate in that:

1. On or about June, 1957, petitioner filed a complaint with the Division of Labor Law Enforcement against respondent alleging that respondent had not paid vacation pay to its former employes in accordance with the collective bargaining agreement between petitioner and respondent. A hearing was held before the Division of Labor Law Enforcement and after hearing and investigation, the Division of Labor Law Enforcement declined to issue a complaint against respondent. Petitioner failed and refused to demand arbitration pursuant to the terms of the collective bargaining agreement until after a hearing and investigation by the Division of Labor Law Enforcement, to wit, on or about July 11, 1957. The basis of the claims filed with the Division of Labor Law Enforcement by petitioner, as hereinbefore alleged and referred to, are the same claims for vacation pay and holiday pay, which are now the basis for petitioner's demand for arbitration in this action. Petitioner incurred in excess of \$1,000.00 in attorneys' fees and costs in defending the aforesaid proceeding before the Division of Labor Law Enforcement. Petitioner, by its conduct, has waived its right

to arbitrate and further there was an unreasonable delay on the part of petitioner in requesting arbitration. Petitioner, by its conduct aforesaid, has repudiated the arbitration clause and did make an election of remedies in processing the claims before the Division of Labor Law Enforcement rather than through the arbitration provisions of the collective bargaining agreement. Further, petitioner did not complain about discharges or vacation pay within the time specified in the contract.

2. Petitioner comes into Court with unclean hands, and there has been a failure of consideration in that petitioner has failed to perform all of the obligations, stipulations and conditions on its part to be performed by virtue of the following facts: On October 8, 1956, respondent agreed to extend the 1953 collective bargaining agreement for an additional three-year period and executed the agreement, which is attached to the third amended petition as Exhibit "A-1" for and in consideration of petitioner's promise to reduce piece work rates of members of petitioner employed by respondent in the amount of fifty cents per dozen shirts on December 5, 1956, and to reduce the said piece work rates in respondent's plant an additional fifty cents per dozen shirts on January 15, 1957. As a further consideration for petitioner's promise to reduce piece work rates in respondent's plant, respondent agreed to grant a ten cents an hour across the board wage increase to all of its employees on November 5, 1956, and to re-employ Pierina Ippolito, a union steward. Respondent performed all of the obligations on its part to be performed under the agreement on October 8, 1956, in that respondent executed the agreement of October 23,

1956, extending the collective bargaining agreement between petitioner and respondent for an additional three years and did grant a ten cents an hour across the board wage increase on November 5, 1956 to respondent's employees and did re-employ Pierina Ippolito. Petitioner failed and refused to perform its obligation to reduce piece work rates on December 15, 1956, and again on January 15, 1957, per the agreement aforesaid, and was at all times in material breach of the October 8, 1956 agreement between petitioner and respondent, as hereinbefore alleged and referred to. Respondent has been damaged by petitioner's failure to reduce piece work rates aforesaid in an amount in excess of \$100,000.00. Respondent would not have entered into the October 23, 1956 agreement, as alleged in the third amended petition had it not been for petitioner's promise to reduce piece work rates, as hereinbefore alleged and referred to.

3. Section 19 of the collective bargaining agreement sued upon herein provides the same terms and conditions given by petitioner to any other garment manufacturer shall be available to respondent. Respondent alleges that in the month of February, 1957, Bailey Manufacturing Company, located in Long Beach, California ceased its operations and terminated all of its employees. Respondent alleges that petitioner did not require Bailey Manufacturing Company to pay vacation pay to its terminated employees and, therefore, respondent is not obligated to pay vacation pay to its terminated employees.

For a Sixth Separate and Further Defense,
Respondent Alleges:

This action is barred by virtue of section 1280 California Code of Civil Procedure in that this is an action to compel arbitration of individual contracts pertaining to labor in order to recover wages for former employees of respondent based on said former employees' promise to perform labor for respondents and respondent's promise to pay therefor a stipulated price.

Wherefore, respondent prays judgment that the petition for order directing that arbitration proceed be denied, for costs of suit incurred and for such other relief as the Court deems just and proper.

HILL, FARRER & BURRILL
/s/ By RAY L. JOHNSON, JR.
Ray L. Johnson, Jr.
Attorneys for Respondent.

[Seal]

Edmund G. Brown

Governor of California

John P. Henning

Director of Department

State of California

Department of Industrial Relations

965 Mission Street, San Francisco 3

Divisions

Housing

Industrial Safety

Industrial Welfare

Industrial Accidents

Conciliation Service

Labor Law Enforcement

Apprenticeship Standards

Fair Employment Practices

Labor Statistics and Research

State Compensation Insurance Fund

February 1, 1960

Address Reply To:

LB 67549

State of California

Department of Industrial Relations

Division of Labor Law Enforcement

Room 210, 235 East Third Street

Long Beach 12, California

Grunwald Marx

932 Wall Street

Los Angeles 15, Calif.

Complaint has been filed against you with this Division under the State wage law, as follows:

Violations of Section 201 & 208—State Labor Code

Lucy M. Albani,	wages due from (vacation) 6/56—6/57, 2 wks @	\$1.70 hr.....	\$136
Martha Clifford,	" " " " " "	@ \$1.85 hr.....	\$140
Rose Spinell	" " " " " "	\$1.75 hr.....	\$140
Matilda Neordman	" " " " " "	\$1.70 hr.....	\$136
May H. Turnbull	" " " " " "	\$1.70 hr.....	\$136
Kathleen F. Lindsay	" " " " " "	\$2.00 hr.....	\$160
Grace Decoma	" " " " " "	\$1.00 hr.....	\$ 80.

The State law makes it a misdemeanor to fail to pay wages when due.

The wages claimed above have been assigned in writing to the Division of Labor Law Enforcement for collection, and any settlement must be made through this Division.

If this claim is correct, we urge you to forward immediately to us a certified check or money order made payable to the Labor Commissioner for the amount due. Payment must be accompanied by a separate or detachable itemized statement of any deductions made, as provided by law.

If the claim as filed is not correct, please let us have a statement of facts from you, Accompanied by Payment of Any Amount Which You Concede That You Owe the Claimant. Your statement of facts should be In Duplicate so that we may send a copy to the claimant, if necessary.

In either case, we request an answer to this communication within 10 days from the date of this letter.

Very truly yours,

SIGMUND ARYWITZ

State Labor Commissioner

/s/ By I. H. Merritt

Deputy Labor Commissioner

Received Feb. 3, 1960—Grunwald-Marx.

cc: claimant mb

DLLE 10

Exhibit "A"

Dorothy M. Oldfield, wages due (vacation) from 6/56 to 6/57, 2 wks	@	\$2.30 hr.....	\$184
Catherine Olivadote, “ “ “ “ “ “	@	\$60 wk	\$120
Frieda Shaevitz, “ “ “ “ “ “	@	\$1.60 hr.....	\$128
Helene Schochet, “ “ “ “ “ “	@	\$1.50 hr.....	\$128

In the Matter of the Petition of Jerome Posner, etc.

State of California, County of Los Angeles—ss.

No. 689026

I, Harold J. Ostly, County Clerk and Clerk of the Superior Court within and for the county and state aforesaid, do hereby certify the foregoing to be a correct copy of the original Amended Answer to Third Amended Petition for Order Directing Arbitration (including Notice of Filing Claims marked Exhibit “A” attached thereto) filed february 5, 1960, on file and of record in my office, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Superior Court this 24th day of October 1960.

HAROLD J. OSTLY,
County Clerk and Clerk of
the Superior Court of
the State of California, in and
for the County of Los Angeles.

/s/ By S. Gahagan, Deputy.

Exhibit “B”

Exhibit C

Hill, Farrer & Burrill
411 West Fifth Street
Los Angeles 13, California
Telephone: MAdison 6-0581
Attorneys for Respondent

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 689,026

In the Matter of

THE PETITION OF JEROME POSNER, MAN-
AGER OF LOS ANGELES JOINT BOARD,
AMALGAMATED CLOTHING WORKERS
OF AMERICA,

for an Order Directing Arbitration.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This cause came on regularly to be heard before the Honorable Clarke E. Stephens, Judge of the above entitled court, sitting without a jury, Wirin, Rissman, Okrand & Posner, by Paul Posner, appearing for petitioner, and Hill, Farrer & Burrill, by Ray L. Johnson, Jr., appearing for respondent Grunwald-Marx, Inc. Said hearing was held on the 4th and 5th days of February, 1960, and the Court having considered the verified petition, verified answer, oral testimony and documentary evidence, and having heard argument of counsel, said

cause was submitted to said Court on February 5, 1960. Said Court, being duly advised in the premises, now makes the following:

Findings of Fact

I.

The allegations of paragraph I of the third amended petition are true.

II.

The allegations of paragraph II of the third amended petition are true.

III.

The allegations of paragraph III of the third amended petition are true.

IV.

The allegations of paragraph IV of the third amended petition are true.

V.

The allegations of paragraph V of the third amended petition are true.

VI.

The allegations of paragraph VI of the third amended petition are true.

VII.

The allegations of paragraph VII of the third amended petition are true except that the Court finds, with reference to the last sentence of paragraph VII, that there was a reasonable expectation that said employees would have been on the payroll at the commencement of the vacation period had not the company moved its manufacturing plant, as aforesaid, prior to the commencement of the vacation period; and that, because of

the said moving prior to the commencement of the vacation period, the company has failed and refused to pay said employees their vacation pay.

VIII.

The allegations of paragraph VIII of the third amended petition are true.

IX.

The allegations of paragraph IX of the third amended petition are true.

X.

The allegations of paragraph X of the third amended petition are true.

XI.

The allegations of paragraph XI of the third amended petition are true.

XII.

The allegations of paragraph XII of the third amended petition are true.

XIII.

The allegations of paragraph XIII of the third amended petition are true.

XIV.

The allegations of paragraph XIV of the third amended petition are true.

XV.

The Court finds that the allegations of the second affirmative defense are not true.

XVI.

The Court finds that the allegations of the third affirmative defense are not true.

XVII.

The Court finds that the allegations of the fourth affirmative defense are not true.

XVIII.

The Court finds that the allegations of paragraph I of the fifth affirmative defense are untrue.

The Court finds that the following allegations of paragraph II of the fifth affirmative defense are true. On October 8, 1956, respondent agreed to extend the 1953 collective bargaining agreement for an additional three-year period and executed the agreement, which is attached to the third amended petition as Exhibit "A-1". On October 8, 1956, respondent further agreed to grant a ten cents across-the-board wage increase to all of its employees on November 5, 1956, and to re-employ Pierina Ippolito, a union steward. Respondent performed all of the obligations on its part to be performed under the agreement of October 8, 1956, in that respondent executed the agreement of October 23, 1956, extending the collective bargaining agreement between petitioner and respondent for an additional three years and granted a ten cents an hour across-the-board increase on November 5, 1956, to respondent's employees and re-employed Pierina Ippolito.

Except as herein found to be true, the Court finds that the allegations of paragraph II of the fifth affirmative defense are not true.

The Court finds that the allegations of paragraph III of the fifth affirmative defense are not true.

XIX.

The Court finds that the allegations of the sixth affirmative defense are not true.

XX.

Petitioner stipulates that he does not desire to arbitrate any issue pertaining to vacation pay or holiday pay for any employee of respondent who remained on the payroll of respondent following the closing of its Long Beach, California, plant after respondent closed the said plant on May 29, 1957.

XXI.

Petitioner stipulates that he does not desire to arbitrate solely, any issue pertaining to the May 30, 1957, holiday pay for any employee of respondent employed by respondent at its Long Beach, California, plant and whose employment terminated due to said closing on, or after, respondent closed the said plant on May 29, 1957.

Conclusions of Law

I.

A collective bargaining agreement in writing providing for arbitration of all complaints, grievances or disputes arising between petitioner and respondent relating directly or indirectly to the provisions of the said agreement was made between petitioner and respondent on the 23rd day of October, 1956, which agreement was in full force and effect until September 30, 1959.

II.

Respondent has refused to arbitrate in accordance with the provisions of the collective bargaining agreement, but is not in default in proceeding thereunder.

III.

Petitioner stipulates that he does not desire to arbitrate any issue pertaining to vacation pay or holiday pay for any employee of respondent who remained on the payroll of respondent following the closing of its Long Beach, California plant after respondent closed the said plant on May 29, 1957.

IV.

Petitioner stipulates that he does not desire to arbitrate any issue pertaining to the May 30, 1957 holiday pay for any employee of respondent employed by respondent at its Long Beach, California plant and whose employment terminated due to said closing on or after respondent closed the said plant on May 29, 1957.

V.

The wording of the collective bargaining agreement is without ambiguity as to vacation pay and holiday pay. ~~Without allegation and proof by petitioner that respondent acted illegally, arbitrarily or in bad faith in discharging its employees on or before May 29, 1957, there is no arbitrable issue as to vacation pay and holiday pay.~~ [CES]

VI.

~~There is no allegation or proof by petitioner that respondent acted illegally, arbitrarily or in bad faith in discharging its employees on or before May 29, 1957. The dispute as to vacation pay and holiday pay for employees employed by respondent on or before May 29, 1957 is not subject to arbitration.~~ [CES]

VII.

Respondent is entitled to judgment that the petition for order directing that arbitration proceed, be denied and the proceeding be dismissed.

VIII.

Respondent is entitled to judgment for costs and disbursements incurred herein.

Dated: This 16 day of May, 1960.

[Seal]

/s/ CLARKE E. STEPHENS

Judge of the Superior Court

Exhibit D

Hill, Farrer & Burrill
411 West Fifth Street
Los Angeles 13, California
Telephone: MAdison 6-0581
Attorneys for Respondent

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 689,026

In the Matter of

THE PETITION OF JEROME POSNER, MAN-
AGER OF LOS ANGELES JOINT BOARD,
AMALGAMATED CLOTHING WORKERS
OF AMERICA,

for an Order Directing Arbitration.

JUDGMENT AND ORDER DENYING ARBITRATION AND DISMISSING PROCEEDING

This matter, having on the 4th and 5th days of February, 1960, regularly come before me for hearing pursuant to a Notice of Motion for petitioner Jerome Posner for an order directing arbitration of the controversy alleged in the third amended petition on file herein in the manner provided for in the written contract between Los Angeles Joint Board, Amalgamated Clothing Workers of America and Grunwald-Marx, Inc. dated the 23rd day of October, 1956, a copy of which is attached to said petition and marked Exhibits "A" and "A-1", Wirin, Rissman, Okrand & Posner, by Paul Posner appearing as counsel for petitioner, and Hill, Farrer & Burrill, by Ray L. Johnson, Jr. appearing as counsel for Grunwald-Marx, Inc., and it appearing to the satisfaction of the Court that an order should issue that respondent is not in default in proceeding thereunder and that the petition should be denied and the proceeding dismissed.

It Is Therefore Ordered, in accordance with the Findings of Fact and Conclusions of Law heretofore found by me and filed concurrently herewith, that the petition for order directing that arbitration proceed is denied and the proceeding is dismissed, respondent to recover its costs and disbursements herein incurred in the sum of \$12.50.

Dated: This 16 day of May, 1960.

[Seal] /s/ CLARKE E. STEPHENS

Judge of the Superior Court

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Jan. 13, 1961.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY
JUDGMENT

To Grunwald-Marx, Inc., Defendant, and Hill, Farrer
& Burrill, its attorneys:

Notice is hereby given, that on Monday, March 20, 1961, at 10:00 o'clock, a.m., or as soon thereafter as counsel can be heard, in the Courtroom of the Honorable Myron Crocker, of the above-entitled Court, located in the Federal Post Office and Courts Building, 312 N. Spring Street, Los Angeles, California, plaintiff will move the Court for a summary judgment on the grounds that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law.

This Motion will be based upon this Notice of Motion, the Memorandum of Points and Authorities filed herewith, the affidavit of Jerome Posner filed herewith, and all the records, pleadings and documents on file herein.

Dated at Los Angeles, California, this 9 day of March, 1961.

WIRIN, RISSMAN, OKRAND & POSNER,
ROBERT R. RISSMAN,
JACOB SHEINKMAN,

/s/ By PAUL M. POSNER,
Attorneys for Plaintiff.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 10, 1961.

[Title of District Court and Cause.]

AFFIDAVIT OF JEROME POSNER

State of California, County of Los Angeles—ss.

Jerome Posner, being duly sworn, deposes and states:

That at all times referred to in and material to this lawsuit, affiant was the manager of and a member of the plaintiff labor organization and is the person whose signature appears on Exhibits A and B attached to and made a part of the Amended Complaint.

Prior to April 15, 1957, affiant received information that defendant was sending out work on men's shirts to a plant other than those located at Long Beach, California and Los Angeles, California. On April 15, 1957, affiant wrote a letter to Mr. Fred Grunwald, president of defendant corporation, which letter is attached hereto as Exhibit D (in order to avoid confusion, exhibit letters will continue in sequence from the attached to the Amended Complaint, A, B and C) and incorporated herein by reference, stating that defendant was in violation of the agreement. A letter dated April 19, 1957 was received from defendant in reply and is attached hereto as Exhibit E and incorporated herein by reference. On April 24, 1957, affiant again wrote to defendant and requested arbitration of the matter then in dispute and appointed an arbitrator for the union in accordance with paragraph 14 of the agreement; this letter is attached hereto as Exhibit F and incorporated herein by reference. On May 3, 1957, affiant sent a letter, attached hereto as Exhibit G and incorporated herein by reference, to

defendant. Exhibit H attached hereto and incorporated herein by reference is a letter dated May 3, 1957 and was received by affiant from defendant. On May 6, 1957 affiant sent a letter to defendant, which letter is attached hereto as Exhibit I and incorporated herein by reference. Exhibit J, attached hereto and incorporated herein by reference, is a letter dated May 10, 1957 received by affiant from defendant.

Subsequently, and on or about May 29, 1957, defendant completed the closing of its plants at Long Beach and Los Angeles.

On September 20, 1960, affiant sent a letter to defendant, attached hereto as Exhibit K and incorporated herein by reference, requesting arbitration of matters set forth therein.

Exhibit L is a letter dated October 13, 1960, sent to plaintiff by the attorneys for defendant declining arbitration.

Defendant, in its Answer to Amended Complaint, has denied the allegations contained in paragraph XI of said Amended Complaint. This affidavit is made to show that on numerous occasions plaintiff has requested arbitration in writing, and that defendant has declined and refused to arbitrate.

Subscribed and sworn to before me this 8th day of March 1961.

/s/ JEROME POSNER

/s/ EMANUEL SOSNIAK,

Notary Public in and for County and State.

My Commission Expires June 2, 1963.

Exhibit D

April 15, 1957

Certified Mail

Mr. Fred Grunwald
Grunwald-Marx
932 Wall Street
Los Angeles 15, Calif.

Dear Mr. Grunwald:

I have been informed that some of your cut work in Long Beach is being sent to your plant in Phoenix, Arizona. This is being done in violation of our agreement.

As I told you when we discussed this in your office on Friday, unless you supply enough work for your employees, you cannot send your work out to be done elsewhere. If you do, you are violating the contract. Your early reply to this letter will be appreciated.

Very truly yours,

Jerome Posner
Manager

JP/mc
278 acwa

Exhibit E

Grunwald-Marx

Office of the President Fred Grunwald

April 19, 1957

Mr. Jerome Posner
Los Angeles Joint Board
Amalgamated Clothing Workers of America
2501 South Hill Street
Los Angeles 7, California

Dear Mr. Posner:

Your letter of April 15 refers to Paragraph 17 of the contract.

I like herewith to state that we are not in violation of this paragraph.

Very truly yours,

GRUNWALD-MARX, INC.

/s/ FRED GUNWALD,
President

FG/bs

Exhibit F

April 24, 1957

Certified Mail

Mr. Fred Grunwald, President
Grunwald-Marx
932 Wall Street
Los Angeles 15, California

Dear Mr. Grunwald:

I have your letter of April 19, in answer to our letter of April 15 that refers to Paragraph 17 of the contract.

You claim that there is no violation of this Paragraph. As we stated before, our interpretation is that you are violating this section of our collective bargaining agreement. Unless this matter can be straightened out between ourselves, we wish to inform you that we shall request arbitration of this dispute; and you are further informed that we appoint Leonard Levy to represent the union at arbitration proceedings in this matter.

Your early reply to this matter is requested.

Very truly yours,

Jerome Posner
Manager

JP/mc
278 acwa

Exhibit G

May 3, 1957
Certified Mail

Mr. Fred Grunwald
Grunwald-Marx
932 Wall Street
Los Angeles 15, Calif.

Dear Mr. Grunwald:

On April 19, I sent you a letter in regard to the work that was being cut in Long Beach and then sent to Phoenix. I stated that we regarded this as a violation of our collective bargaining agreement. Since we are unable to agree on the interpretation of this contract, I asked for arbitration.

To date, I have not received a reply from you. Kindly let me hear from you, in this connection, as soon as possible.

Very truly yours,

Jerome Posner
Manager

JP/mc
278 acwa

Exhibit H

Grunwald-Marx

Office of the President Fred Grunwald

May 3, 1957

Mr. Jerome Posner
Los Angeles Joint Board
Amalgamated Clothing Workers of America
2501 South Hill Street
Los Angeles 7, California

Dear Mr. Posner:

The answer to your letter of April 24 was unfortunately delayed by two out-of-town trips which I had to make.

I emphasize again that we are not in violation of Paragraph 17.

However, I gave the order that no goods will be cut any more in Long Beach which are not to be sewn in Long Beach. The consequence, of course, will be that the Cutting Department will be discharged earlier than I anticipated.

If you want to discuss this matter further with me, please call my office for an appointment.

Very truly yours,

GRUNWALD-MARX, INC.

/s/ FRED GRUNWALD

President

FG/bs

Exhibit I

May 6, 1957
Certified Mail

Mr. Fred Grunwald
Grunwald-Marx
932 Wall Street
Los Angeles 15, Calif.

Dear Mr. Grunwald:

We have your reply of May 3 to our letter of April 24. It is still our belief that you are in violation of Paragraph 17 of our collective bargaining agreement, and notwithstanding any change in your procedure, we still request that this violation be arbitrated as it our request that the employees be reimbursed for the work that they lost by your failure to comply with this section.

It is indeed a sorry state of affairs that your usual punitive methods are being used again in this case. You seem to take great delight in hurting the people as much as you possibly can. I am truly sorry that you have a heart condition, as you claim, but I sometimes wonder if you have a heart. If you did, you could not possibly take all this out on the people who have made it possible for you to enjoy your prosperity in this country. It seems impossible to settle any matter with you peacefully. You insist that the only way you will be satisfied is to let you have your way. We are most thankful that this is the United States and there are ways and means of settling matters without giving in completely to one side. We intend to take

every legal means available to us to settle this matter. As noted before, we have designated Mr. Leonard Levy as our representative for arbitration, and we expect to hear from you immediately on this matter.

Very truly yours,

Jerome Posner, Manager

JP/mc

Exhibit J

Grunwald-Marx

Office of the President-Fred Grunwald

May 10, 1957

Mr. Jerome Posner
Los Angeles Joint Board
Amalgamated Clothing Workers of America
2501 South Hill Street
Los Angeles 7, California

Dear Mr. Posner:

I have received your letter of May 6 and I checked Paragraph 17 of the contract again very carefully. The contract reads as follows:

“During the term of this Agreement, the Company shall not, without the consent of the Union, directly or indirectly manufacture garments or cause them to be manufactured in any factory other than its own factories unless its employees in its own factories are first supplied with work.”

I herewith confirm again to you that we did not place any garments in work with any outside manufacturers; that every individual garment which Grunwald-Marx has manufactured has been manufactured in its own factories.

I really cannot see where I am in violation of the contract and I would like you to point out any violation with facts and details. If there is any doubt that I could be in violation of the contract, I feel the matter could be settled in personal discussion or, if you prefer, in arbitration to which I will not object.

As far as the second paragraph of your letter is concerned, I do not wish to dignify your derogatory remarks with a reply.

Very truly yours,
GRUNWALD-MARX, INC.
/s/ FRED GRUNWALD,
President.

FG/bs

Exhibit K

September 20, 1960

Certified Mail

Grunwald-Marx, Inc.

932 Wall Street

Los Angeles 15, California

Att: Fred Grunwald, President

Gentlemen:

Pursuant to the provisions of Paragraph number 14 of the Collective Bargaining Agreement between Grunwald-Marx, Inc. and Los Angeles Joint Board, Amalgamated Clothing Workers of America dated October 1, 1953, as extended and modified by the Agreement between said parties dated on or about October 23, 1956, request is herewith made upon you for submission to arbitration of the dispute between us concerning your violation of Articles 15 and 17 of the Agreement.

You are advised that the issues to be presented to the Board of Arbitrators will be the following:

1. Your violation of Paragraph 15, by the lock-out of your employees by the removal of your manufacturing operations from the Los Angeles and Long Beach, California plants to Phoenix, Arizona, during the period from or about May 29, 1957 to and including September 30, 1959.

2. Your violation of Paragraph 17 by the manufacture of garments at Phoenix, Arizona, during the period from on or about April 10, 1957 to and including September 30, 1959.

In the arbitration proceedings, we shall demand damages, occasioned by your respective breaches, for loss of wages, holiday pay, vacation pay, insurance contributions and dues during the periods specified in the preceding paragraph, and we shall demand such other monetary and other equitable relief as the Board of Arbitrators may properly grant. You are advised that we herewith designate Leonard Levy as our representative of the Board of Arbitrators. Will you please designate your member so that your designatee and Mr. Levy may confer immediately for the purpose of selecting the third member of the Board of Arbitrators as required by the provisions of Paragraph 14 of the Agreement.

The requests herein contained are made in addition to and without waiving and without prejudice to any request for arbitration which may have heretofore been made by us and previously rejected by you.

May we have your reply without any delay.

Yours very truly,

LOS ANGELES JOINT BOARD
AMALGAMATED CLOTHING
WORKERS OF AMERICA
Jerome Posner, Manager

JP:tb

CC:Ray L. Johnson, Jr., Esq.

Exhibit L

Law Offices
Hill, Farrer & Burrill
Tenth Floor
411 W. Fifth Street at Hill Street
Los Angeles 13, California
MAdison 6-0581
October 13, 1960.

Copy

Los Angeles Joint Board
Amalgamated Clothing Workers of America
2501 South Hill
Los Angeles 7, California
Attention: Jerome Posner, Manager

Gentlemen:

This is in reply to your letter of September 20, 1960, addressed to our client, Grunwald-Marx, Inc. This matter has been turned over to us for reply.

Please be advised that the company declines to arbitrate the matters set forth in your letter for the reason that the company is not required by law to arbitrate these matters.

Very truly yours,

RAY L. JOHNSON, JR.

of

HILL, FARRER & BURRILL

RLJ:bj

cc: Robert R. Rissman

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 10, 1961.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR
SUMMARY JUDGMENT

To: Los Angeles Joint Board, Amalgamated Clothing
Workers of America, Plaintiff, and Wirin, Riss-
man, Okrand & Posner, Its Attorneys:

Notice is hereby given that on April 17, 1961, at
10:00 o'clock A.M., or as soon thereafter as counsel
can be heard, in the courtroom of the Honorable
Myron Crocker of the above entitled court, located in
the Federal Post Office and Courthouse Building, 312
North Spring Street, Los Angeles, California, defend-
ant will move the Court for a summary judgment on
the ground that there is no genuine issue as to any
material fact and that defendant is entitled to judgment
as a matter of law.

This Motion will be based upon this Notice of Motion,
the Memorandum of Points and Authorities filed here-
with, the Affidavit of Fred Grunwald filed herewith,
and all the records, pleadings and documents on file
herein.

Dated: This 23rd day of March, 1961.

HILL, FARRER & BURRILL
/s/ By RAY L. JOHNSON, JR.
Attorneys for Defendant.

Receipt of copy.

Affidavit of Service by Mail Attached.

[Endorsed] : Filed March 24, 1961.

[Title of District Court and Cause.]

AFFIDAVIT OF FRED GRUNWALD

State of California, County of Los Angeles—ss.

Fred Grunwald, being first duly sworn, deposes and says:

That at all times referred to herein and material to this lawsuit, affiant was President of the defendant corporation.

On October 1, 1953, plaintiff and defendant entered into a written contract covering the wages, hours and working conditions of defendant's employees as set forth in the collective bargaining agreement, which is attached to the complaint as Exhibit "A", which contract expired on September 30, 1956. On October 8, 1956, defendant agreed to renew and extend the said collective bargaining agreement for an additional three-year period.

On October 13, 1954, plaintiff entered into an agreement with defendant wherein and whereby it was agreed that the piece work rates for the operations in defendant's Long Beach plant would be adjusted commencing November 27, 1954, so that the average earnings of all of the employees of defendant who were members of plaintiff union and who were compensated on a piece work rate basis would be reduced from \$1.68 per hour per employee to \$1.60 per employee. At all times since November 27, 1954, plaintiff refused to adjust the piece work rates for the operations in defendant's plant in accordance with the said agreement.

On October 8, 1956, plaintiff and defendant entered into a second agreement wherein and whereby it was agreed that on December 15, 1956, piece work rates for the operations in defendant's Long Beach plant would be reduced in the amount of fifty cents per each and every dozen shirts manufactured in defendant's plant. On October 8, 1956, plaintiff and defendant further agreed that on January 15, 1957, the piece work rates for the operations in defendant's Long Beach plant would be further reduced in the amount of fifty cents per each and every dozen shirts manufactured in defendant's plant. At all times since October 8, 1956, plaintiff refused to adjust the piece work rates for the operations in defendant's plant, pursuant to the agreement of October 8, 1956.

Thereupon, defendant did file suit in the Los Angeles Superior Court, Case No. 667,450, alleging a breach of the aforesaid agreement of October 13, 1954, and the aforesaid agreement of October 8, 1956. The trial of the case was held in the Los Angeles Superior Court and on November 16, 1959, the Los Angeles Superior Court found that plaintiff breached both the agreement of October 13, 1954 and October 8, 1956, and judgment was entered in favor of defendant and against plaintiff for the breaches of the aforesaid agreements in the total amount of \$52,548.93. Plaintiff has filed notice of appeal in the District Court of Appeal from said judgment and the matter is pending before the California District Court of Appeals.

Due to the fact that plaintiff failed to put into effect the two agreements to reduce piece work rates in defend-

ant's Long Beach plant, as above set forth, defendant was faced with a severe economic crisis. Realizing the improbability of ever bringing labor costs at defendant's Long Beach plant down to a competitive position due to the refusal of plaintiff to reduce piece rates, as was agreed to, defendant opened a new manufacturing plant in Phoenix, Arizona, in the first week of April, 1957. At that time defendant terminated one-half of its employees at its Long Beach plant and in the last week of May, 1957, defendant terminated the remainder of its employees in its Long Beach plant and transferred its entire manufacturing operation to Phoenix. The Long Beach plant was closed permanently and on July 1, 1957, defendant leased its Long Beach plant for ten years to a retail discount house. Defendant has no legal or business connection whatsoever with the lessee of the Long Beach plant. Defendant has never at any time, anywhere, re-employed any of its employees employed at the Long Beach plant who were terminated between the first week in April, 1957 and the last week in May, 1957.

No manufacturing is done in the Los Angeles plant of defendant. The Los Angeles plant is solely concerned with design, sale and distribution of defendant's shirts. The Phoenix plant is confined solely to the manufacturing phase of defendant's business.

With reference to the letter which affiant addressed to plaintiff on November 21, 1956, which is attached to the complaint as Exhibit "C", affiant states that the purpose of the letter was to clarify paragraphs 1 and 2 of the collective bargaining agreement between

plaintiff and defendant. Paragraph 1 provides that the term "employees" was to include all of the employees of the company (with certain specified exceptions) and paragraph 2 provides that the company recognize the union as the exclusive bargaining representative of its employees. Affiant's letter of November 21, 1956 was sent to plaintiff for the purpose of making it clear that the collective bargaining agreement would not apply to any new plant which might be opened by defendant. Affiant had been advised by counsel that it would be illegal to execute a collective bargaining agreement in which a union is recognized in advance as the exclusive bargaining representative of employees at a plant not yet opened by the company. For this reason, affiant addressed the letter to plaintiff making it clear that the agreement covered only its Los Angeles and Long Beach operations.

Affiant states that defendant has incurred in excess of \$3,000.00 in legal fees and other costs connected with the litigation in defending the suit brought by plaintiff in the Los Angeles Superior Court, being Case No. 689,026. Affiant states that plaintiff's action in bringing suit in the Los Angeles Superior Court was to compel defendant to arbitrate a dispute as to whether or not defendant was compelled to pay vacation pay and holiday pay by virtue of paragraph 9 of the collective bargaining agreement between the parties. Affiant states that the instant action has been brought by plaintiff to compel arbitration of a dispute as to whether defendant is compelled to pay vacation pay, holiday pay and wages by virtue of paragraphs 15 and 17 of the collective bargaining agreement between the

parties. Defendant has incurred in excess of \$1,000.00 costs in defending the instant action by way of attorneys' fees and court costs directly connected with the said litigation.

Affiant has read the allegations of defendant's Answer to Amended Complaint further at page 2, lines 6 through 31, and the matters set forth therein are true of affiant's personal knowledge. Affiant incorporates, by reference, the matters set forth in defendant's Answer to Amended Complaint at page 2, lines 6 through 31.

Affiant states that on October 30, 1956, January 4, 1957, January 8, 1957 and April 12, 1957, meetings were held between representatives of plaintiff and defendant at which affiant was present. At each of the aforesaid meetings, plaintiff was advised that, because of the critical economic problems that faced the company, and the refusal of plaintiff to reduce labor costs at defendant's Long Beach plant, per the agreements set forth above in this affidavit, it would be necessary for defendant to move its manufacturing plant. Plaintiff was advised by defendant on October 30, 1956, that defendant had investigated a possible new plant site for its manufacturing operations in Henderson, Nevada, and Phoenix, Arizona. Plaintiff was further advised, by defendant, that defendant could effect a savings of somewhere between \$2.00 and \$3.00 per dozen shirts in either of these areas and that this was necessary in order for defendant to remain competitive in the industry. Posner, manager of plaintiff, advised defendant's representatives that it was not neces-

sary to leave the Southern California area; that if the company wanted to open another plant it was free to do so and he would see that the company got the following conditions in a new plant somewhere in Southern California: (1) A wage scale where employees would average between \$1.20 and \$1.35 per hour instead of \$2.00 per hour; (2) that time workers would average between \$1.00 and \$1.10 per hour; (3) Posner would not attempt to unionize defendant's manufacturing plant for a period of from six months to one year; (4) Posner would give the company a waiver of approximately six months to one year in paying premiums into the union's insurance and retirement fund.

Posner was advised at this October 30, 1956 meeting that if the company opened up another plant in another area, it would mean greatly curtailing the Long Beach operation. Posner replied that he realized this, but that a company has to be competitive and make money in order to stay in business and that he would not oppose such a move. At a subsequent meeting on January 8, 1957, affiant advised Posner that he was fighting for the very existence of his company; that the company had lost its foothold in the East and Middlewest; that the company had been driven out of the plain shirt business and existed only on its fancy shirt business; that the company was forced to close down the Chicago office and that the company would have to move its manufacturing plant in Long Beach since the average earnings in the Long Beach plant had risen to approximately \$2.00 per hour. Posner again stated that he could not stop the company from moving

its plant, but that it was not necessary to move out of the Southern California area; that if defendant relocated its plant in the Southern California area, Posner would see that the company got the conditions which are set forth above in this affidavit, as stated by Posner at the October 30, 1956 meeting between the parties.

On January 15, 1957, plaintiff did not put into effect the fifty cents reduction in piece work rates which was agreed to on October 8, 1956. Thereupon, on or about January 18, 1957, defendant signed a contract to build a new plant in Phoenix, Arizona. By the last week in May, 1957, defendant had completed transferring its entire manufacturing operation to Phoenix and its Long Beach plant was permanently closed and all of defendant's employees permanently terminated.

At the meeting on April 12, 1957, at which affiant was present, Posner demanded vacation pay for the employees who were being terminated. No other form of wages for the employees who were being terminated was mentioned by Posner except vacation pay. Posner stated that under paragraph 9 the employees were entitled to vacation pay. Affiant stated that under paragraph 9 the employees were not entitled to vacation pay, since the employees had to be on the payroll on July 1 of any year in order to be eligible for vacation pay. Posner threatened to call a strike or walk-out on this issue. Talpis, defendant's vice-president, pointed out that the contract provided that there would be no strikes or walk-outs and that the union would be liable for any damage which the company sustained.

Posner thereupon blamed the company for the present situation where all of the employees in Long Beach were losing their jobs. Affiant answered with a short resume of plaintiff's broken promises, insofar as wage adjustments were concerned and pointed out that the company was forced to move to Phoenix because the union's agreements to reduce piece rates was never followed up by action. Affiant stated that the decision to definitely go ahead with the new factory in Phoenix was not made until after January 15, 1957, when it became apparent that plaintiff was not going to make good on any of its promises. As the meeting started to break up, Posner expressed the hope that the company would be sorry for its move.

With reference to the affidavit of Jerome Posner containing correspondence between Posner and affiant, affiant states that paragraph 17 of the contract means that the defendant will not subcontract the manufacture of its garments to any other company other than its own factories, unless its employees in its own factories are first supplied with work. Affiant states that affiant has never directly or indirectly, manufactured garments, or caused them to be manufactured in any factory other than its own factories, unless its employees in its own factories were first supplied with work. Affiant states that the claim of plaintiff is frivolous in that plaintiff is complaining about the manufacture of defendant's garments in its Phoenix, Arizona plant, which is clearly permitted by virtue of paragraph 17 of the agreement.

/s/ FRED GRUNWALD

Subscribed and sworn to before me this 23rd day of March, 1961.

[Seal]

/s/ FLORENCE J. FARNSWORTH,
Notary Public in and for
said County and State.

My Commission Expires March 22, 1963.

Receipt of Copy.

Affidavit of Service by Mail Attached.

[Endorsed] : Filed March 24, 1961.

[Title of District Court and Cause.]

ORDER

Los Angeles Joint Board, (Union) seeks to compel Grunwald-Marx, a California clothing manufacturer, (Company) to arbitrate certain issues pursuant to a collective bargaining agreement. Jurisdiction is found in §301(a) Labor Management Relations Act of 1947 [29 U. S. C. 185(a)]. The Court, having heard cross motions for summary judgment, hereby grants plaintiff's motion for the reasons stated.

The Union and Company entered a collective agreement on October 1, 1953, which agreement was extended until September 30, 1959, and made to cover the workers in defendant's Long Beach and Los Angeles factories.

Article 14 provides that disputes were to be settled by arbitration in the following language:

“All complaint, grievance or dispute arising between the parties relating directly or indirectly to the provision of this agreement whether concerning discharges or any other term therefor . . . (after other methods fail) . . . shall be submitted to arbitration.” ***

Article 15 provides there would be no strikes.

During April and May, 1957, defendant moved its entire Long Beach and Los Angeles facilities to Phoenix, Arizona, thereby terminating the employment of well over one hundred employees.

The Union contends that this move violated Article 17 of the agreement by removing its manufacturing operations, and violated Article 15, by locking out employees. The Union contends these violations deprived employees of wages from the time of their termination, holiday pay for all holidays from July 4, 1957, through and including Labor Day, 1959, and vacation pay for the years 1958 and 1959. They further claim injury because of the failure to make insurance contributions after the move, and injury to the Union through loss of membership.

***Errors in syntax in the quoted portion appear in the writing of the contract. Apparently the word “All” was originally erroneously written “No,” and when the change was made, the parties omitted to change the rest of the clause to conform. Portion in parenthesis refers to provisions specifying attempted settlement by representatives of each side.

Now, the Union submits that there is no genuine issue of material fact, and moves for summary judgment. [See *United Textile Workers v. Goodall-Sanford, Inc.*, (D.C. Maine, 1955), 131 F. Supp. 767, *aff'd.*, 233 F. 2d 104, *aff'd.*, 353 U. S. 550].

Defendant opposes motion for summary judgment and cross moves on its own motion for summary judgment, relying principally on the fact that plaintiff sought specific performance of the same arbitration agreement in the California Superior Court. The third amended complaint in that action, filed in October 1959, sought arbitration on the issue of (1) vacation pay for all employees covered by the agreement who were in the employ of the Company for nine months or more as of the time when the plant was moved, and (2) holiday pay for Decoration Day, May 30, 1957.

Following rules enunciated by the New York courts, commonly referred to as the "Cutler-Hammer" doctrine, [*International Assn. of Machinists v. Cutler-Hammer, Inc.*, 271 App. Div. 917], the Superior Court found that the dispute did not fall within the terms of the agreement reasonably interpreted, and denied arbitration. This decision was affirmed by the California District Court of Appeals, (187 A. C. A. 878) and has been heard but not yet decided by the California Supreme Court.

Hence the question before this Court is whether, or to what extent, the action brought in the State Court precludes or limits the demand for arbitration in this Court.

Since the decision in the Lincoln Mills case, 353 U. S. 448, this Court is bound by federal law in matters arising under §301 of the Labor Management Relations Act. In 1960, the Supreme Court specifically denounced the "Cutler-Hammer" doctrine and held that the function of the District Courts, in suits seeking to compel arbitration under §301, is limited. [United Steelworkers of America v. American Manufacturing Co., 363 U. S. 564; United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U. S. 574; United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U. S. 593].

In *American*, Mr. Justice Douglas said, (363 U. S. at pp. 567-8):

"The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator."

Here, the Union has contended that the Company breached its agreement in contracting work out and in precipitating a lockout. Whether or not these claims are valid, they constitute a "complaint, grievance or dispute arising between the parties relating directly or indirectly to the provisions of this agreement . . ." [Art. 14], and are "governed by the contract".

Although able counsel has cited no case in point, the language and spirit of the three Steel Workers

cases indicates that it is for the arbitrator and not for this court to decide whether or not the State Court has imposed any limitations upon the issues to be determined.

The company's contention that the Union is "splitting its cause of action", important in traditional concepts of contract law, is invalid in the federal law of arbitrability of labor disputes.

Two points bear further mention:

(1) This decision compelling arbitration is in no way to be construed as an attempt to interfere with the State court decision, whatever the outcome there. Rather it is for the arbitrators, and not for this court to determine in what manner the State court has limited their function, and narrowed the issues which they are to determine. Nor is this decision to be construed as expressing any opinion on any of the defenses which defendant has raised here, such as *res judicata*, *laches*, *estoppel* or others.

(2) It is arguable that the present case may be distinguished on its facts from the Steel Workers cases. There, a principle reason for the rules encouraging arbitration was the belief that settlement of disputes by arbitration tends to benefit the continuing relationship between Union and Company and thereby promote industrial peace. [See *America*, *supra*.] Here, however, the movement of the work to Phoenix has apparently terminated the relationship. Although recognizing this difference, the Court believes that the language and spirit of those cases forbids this distinction from controlling. See *Enterprise*, *supra*.

Counsel for plaintiff is hereby ordered to submit new findings in conformity with this order, under Local Rule 7.

Dated: April 20th, 1961.

/s/ M. D. CROCKER,
United States District Judge.

[Endorsed] : Filed April 20, 1961.

In the United States District Court
Southern District of California,
Central Division.

No. 1190-60-MC

LOS ANGELES JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, an unincorporated voluntary association,
Plaintiff,

vs.

GRUNWALD-MARX, INC., a California corporation,
Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND JUDGMENT.

This cause came on regularly to be heard before the Honorable Myron Crocker, Judge of the District Court, Wirin, Rissman, Okrand & Posner, by Robert R. Rissman and Jacob Sheinkman, appearing for plaintiff

and Hill, Farrer & Burrill, by Ray L. Johnson, Jr., appearing for defendant, on a motion made by plaintiff for summary judgment, and on cross-motion by defendant for a summary judgment. Said hearing was held on the 17th day of April, 1961 and the Court, having considered the verified Amended Complaint and verified Answer and the Affidavit of Jerome Posner and the Affidavit of Fred Grunwald, and having heard argument of counsel, said cause was submitted to said Court and said Court, being duly advised in the premises, now makes the following:

Findings of Fact

I.

Plaintiff is a labor organization within the meaning of the Labor-Management Relations Act of 1947 and is a voluntary unincorporated association representing employees in the men's apparel industry in the Southern District of California, including the employees of the defendant, in an industry affecting commerce within the meaning of the Act.

II.

Defendant is a corporation duly organized and existing under the laws of the State of California, having its principal place of business in the City of Los Angeles, State of California. Defendant maintains a manufacturing plant in the City of Phoenix, State of Arizona, and is engaged in the design, sale and distribution of men's shirts at Los Angeles, California and Phoenix, Arizona. Defendant is engaged in business that is in and affects commerce within the meaning of the Labor-Management Relations Act of 1947.

III.

This Court has jurisdiction over the persons and subject matter herein under and pursuant to the provisions of Section 301(a) of the Labor-Management Relations Act of 1947.

IV.

On or about October 1, 1953, plaintiff and defendant entered into a written collective bargaining agreement covering the wages, hours and working conditions of all of the defendant's employees, except executives, administrative and supervisory employees, office clerical employees, salesmen, designers, receiving and shipping, guards and watchmen at the two factories of the defendant then in existence and the only factories then operated by it. These factories were located at Long Beach, California and Los Angeles, California. In said agreement, plaintiff was recognized as the exclusive bargaining representative of the described employees of the defendant with regard to wages, hours and working conditions. On or about October 23, 1956, plaintiff and defendant entered into a written agreement acknowledging the continued existence of the collective bargaining agreement of October 1, 1953 and extending the latter agreement to September 30, 1959. By the terms of the agreement, the agreement was renewable from year to year thereafter unless 60 days notice was given in writing by registered mail prior to the expiration of the agreement of the party's intention to terminate it.

V.

Article 14 provides that disputes were to be settled by arbitration in the following language:

“All complaint, grievance or dispute arising between the parties relating directly or indirectly to the provision of this agreement whether concerning discharges or any other term therefor . . . (after other methods fail) . . . shall be submitted to arbitration.” ***

Article 15 of said Agreement prohibits lockouts, strikes and stoppages for any reason or cause whatsoever.

VI.

On or about November 21, 1956 the defendant's president sent a letter to plaintiff's manager which specifically acknowledge defendant's understanding with plaintiff that the agreement of October 23, 1956 covered defendant's employees in its Los Angeles, California, and Long Beach, California factories. These were the two factories of the defendant then in existence and the only factories then operated by it.

VII.

Said Agreement of October 1, 1953 was extended on or about October 23, 1956 and said letter dated November 21, 1956 were in full force and effect at the time the dispute between the parties arose.

VIII.

On or about April 10, 1957 defendant commenced shifting its manufacturing operations from its manufacturing plants located in the cities of Long Beach and Los Angeles, County of Los Angeles, State of California; and on or about May 29, 1957 defendant completed shifting its manufacturing operation from its

manufacturing plants located in the two aforementioned cities to a manufacturing plant in the City of Phoenix, State of Arizona, not covered by the aforementioned agreements.

IX.

On April 15, 1957, plaintiff notified defendant by letter that plaintiff considered defendant's sending of cut work from its Long Beach plant to its Phoenix, Arizona, plant to be in violation of paragraph 17 of the agreement; and on April 24, 1957, plaintiff requested arbitration of this alleged violation, which request for arbitration was again made on May 3, 1957 and May 6, 1957.

On September 20, 1960 plaintiff requested arbitration from defendant of defendant's violation of paragraphs 15 and 17 of the agreement, by defendant's lock-out of its employees by the removal of its manufacturing operations from the Los Angeles and Long Beach plants to its Phoenix plant during the period from on or about May 29, 1957 to and including September 30, 1959; and by defendant's manufacture of garments at Phoenix, Arizona during the period from on or about April 10, 1957 to and including September 30, 1959; seeking in said arbitration damages for loss of wages, insurance contributions and membership dues during the period of April 10, 1957 to and including September 30, 1959, holiday pay for all holidays from and including July 4, 1957 through and including Labor Day 1959, and vacation pay for the years 1958 and 1959 and seeking other relief. On October 13, 1960, defendant refused to arbitrate.

X.

The Court finds that the defenses alleged by the defendant are to be determined by the arbitrator.

* * * * *

From the foregoing Findings of Fact, the Court derives and makes the following:

Conclusions of Law

I.

Plaintiff is a labor organization within the meaning of the Labor-Management Relations Act of 1957 representing employees in an industry affecting commerce within the meaning of the Act.

Defendant is engaged in a business which is in and affects commerce within the meaning of the Labor-Management Relations Act.

II.

A collective bargaining agreement in writing, providing for arbitration of all complaints, grievances or disputes, arising between plaintiff and defendant relating directly or indirectly to the provisions of said agreement was made between plaintiff and defendant on or about the first day of October, 1953 and extended on October 23, 1956 to be in full force and effect until September 30, 1959, and renewable thereafter from year to year unless 60 days notice was given in writing by registered mail prior to the expiration of the agreement of a party's intent to terminate it.

III.

Complaints, grievances and disputes have arisen between the parties pertaining to claims governed by the terms of the collective bargaining agreement.

IV.

Plaintiff has requested arbitration in accordance with the provisions of the said collective bargaining agreement and defendant has refused to arbitrate and is in default in refusing to proceed thereunder.

V.

An order summarily directing plaintiff and defendant to proceed to arbitration in accordance with said collective bargaining agreement shall issue.

VI.

It is for the arbitrator and not for the Court to determine the merits of the disputes between plaintiff and defendant including any and all defenses of the defendant.

VII.

Plaintiff is entitled to costs herein incurred.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law, it Is Ordered Adjudged and Decreed:

1. That the Motion of Plaintiff for Summary Judgment is hereby granted.
2. That within 30 days after entry of this judgment, the plaintiff and defendant shall proceed to arbitrate the controversies now existing between them in accordance with the terms of the collective bargaining agreement dated October 1, 1953.
3. The Motion of Defendant for Summary Judgment is denied.

4. Plaintiff to recover its costs incurred in the amount of \$.....

Dated: This 17th day of May, 1961.

/s/ M. D. CROCKER
United States District Judge.

Affidavit of Service by Mail Attached.

[Endorsed]: Lodged May 9, 1961. Filed and Entered May 17, 1961.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED
STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT.

Notice Is Hereby Given that Grunwald-Marx, Inc., defendant in the above cause, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order and judgment of this Court entered on May 17, 1961, granting the motion of plaintiff for summary judgment and denying the motion of defendant for summary judgment and ordering plaintiff and defendant to arbitrate within thirty days after entry of judgment.

HILL, FARRER & BURRILL
/s/ By RAY L. JOHNSON, JR.
Attorneys for Defendant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 12, 1961.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

To the Clerk of the United States District Court for
the Southern District of California, Central Division:

You Are Hereby requested to prepare, certify and transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit, with reference to the notice of appeal filed herewith, a transcript of the record in the above entitled cause prepared and transmitted, as required by law and by the rules of the said Court and to include in said transcript the following documents, or certified copies thereof:

1. Complaint.
2. Answer to Complaint.
3. Amended Complaint.
4. Answer to Amended Complaint.
5. Plaintiff's Notice of Motion for Summary Judgment.
6. Affidavit of Jerome Posner.
7. Defendant's Notice of Motion for Summary Judgment.
8. Affidavit of Fred Grunwald.
9. Order of Judge Crocker filed April 20, 1961.

10. Findings of Fact, Conclusions of Law and Judgment.

11. Notice of Appeal.

HILL, FARRER & BURRILL
/s/ By RAY L. JOHNSON, JR.
Attorneys for Defendant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 12, 1961.

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the foregoing documents together with the other items, all of which are listed below, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

PAGE

- 1 Names and Addresses of Attorneys
- 2 Complaint, filed 10/18/60
- 16 Answer to Complaint, filed 11/8/60
- 58 Amended Complaint, filed pursuant to stipulation and Order, 12/19/60
- 73 Answer to Amended Complaint, filed 1/13/61
- 78 Plaintiff's Notice of Motion for Summary Judgment, filed 3/10/61
- 81 Affidavit of Jerome Posner, filed 3/10/61

- 94 Defendant's Notice of Motion for Summary Judgment, filed 3/24/61
- 97 Affidavit of Fred Grunwald, filed 3/24/61
- 105 Order of the Court, filed 4/20/61
- 110 Findings of Fact, Conclusions of Law and Judgment, filed and entered 5/17/61
- 117 Defendant's Notice of Appeal, filed 6/12/61
- 119 Designation of contents of record on appeal, filed 6/12/61
- 122 Minute Order 8/1/61, re extension of time in which Clerk will prepare and forward record on appeal

Dated: August 1, 1961

[Seal] JOHN A. CHILDRESS, Clerk
 /s/ By WM. A. WHITE,
 Deputy Clerk

[Endorsed]: No. 17502. United States Court of Appeals for the Ninth Circuit. Grunwald-Marx, Inc., Appellant v. Los Angeles Joint Board, Amalgamated Clothing Workers of America, Etc., Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California; Central Division.

Filed: August 2, 1961.

Docketed: August 10, 1961.

 /s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 17502

GRUNWALD-MARX, INC.,

Appellant,

vs.

LOS ANGELES JOINT BOARD, AMALGA-
MATED CLOTHING WORKERS OF AMER-
ICA, an unincorporated voluntary association,

Appellee.

STATEMENT OF POINTS RELIED ON AND
DESIGNATION OF RECORD

Statement of Points Relied On

Appellant contends that the trial court erred in finding, as a matter of law, that it is for an arbitrator, and not for the court, to determine the merits of the disputes between Appellant and Appellee, including any and all defenses of Appellant. Appellant contends that it is for the trial court to determine the merit and validity of the defenses raised by Appellant in this proceeding.

Designation of Record

Appellant designates as material to consideration of this appeal all of the record as set forth in Appellant's designation of contents of record on appeal, which has heretofore been filed in this action.

Respectfully submitted,

HILL, FARRER & BURRILL,
/s/ By RAY L. JOHNSON, JR.,
Attorneys for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed August 19, 1961. Frank H. Schmid, Clerk.

No. 17500

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOE DRAGICH and VAN CAMP SEA FOOD COMPANY, INC.,

Appellants,

vs.

NIKOLA STRIKA,

Appellee.

APPELLANTS' OPENING BRIEF.

KARMELICH, FELANDO & MEPHAM,

Suite 208,

United California Bank Building,

413 West Seventh Street,

San Pedro, California,

Proctors for Appellants.

FILED

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FRANK H. SCHMIDT, CLERK

TOPICAL INDEX

	PAGE
Introduction	1
Statement of pleadings and jurisdictional facts.....	1
Statement of the case.....	3
Findings of fact.....	11
Conclusions of law.....	11
Judgment	12
Specification of errors relied on.....	12
Questions presented	13
Statement of the facts.....	14
1. Libelant's testimony	14
2. Testimony of Rudolph F. Kuzamanich.....	18
3. Testimony of Joseph P. Dragich.....	19
4. Testimony of Nicholas A. Mirkovich.....	22
Respondents' Exhibit A.....	24
Libelant's Exhibit I—U. S. Public Health Service Medical Reports	24
Argument	25
A. Introduction	25
B. Was libelant discharged on January 18, 1960, for a cause other than libelant's having fallen ill while in the service of the vessel?.....	26
C. Libelant was not taken ill and disabled in the service of the vessel so as to entitle him to the benefit of wages, maintenance and cure because he had the same affliction at the time he was discharged that he had during the time when he was employed.....	27
Conclusion	31
Appendix. Table of Exhibits.....App. p.	1

TABLE OF AUTHORITIES CITED

CASES	PAGE
Fardy, John v. Trawler Comet Inc., 1955 A. M. C. 2100, 134 Fed. Supp. 528.....	30
Joslin, James Ray v. Steamship Duncan Bay, et al., 1958 A. M. C. 994.....	28, 29
Vitco v. Joncich, 130 Fed. Supp. 945, aff'd 234 F. 2d 16....	27

STATUTES	
United States Code, Title 28, Sec. 1291.....	2
United States Code, Title 28, Sec. 1333.....	2

No. 17500
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

JOE DRAGICH and VAN CAMP SEA FOOD COMPANY, INC.,
Appellants,

vs.

NIKOLA STRIKA,

Appellee.

APPELLANTS' OPENING BRIEF.

Introduction.

The Appellants were the Respondents below. The Appellee was the Libelant below. In the brief, the parties will be referred to as they stood in the Trial Court, and the following symbols will be used:

“T. R.” for “Transcript of Record”

“p.” for “page” and “pp.” for pages”

All emphasis is ours unless otherwise indicated.

Statement of Pleadings and Jurisdictional Facts.

This Libel in Personam was instituted in the U. S. District Court by appellee, Nikola Strika, a California resident, against appellants, Joe Dragich, an individual residing in California, and Van Camp Sea Food Com-

pany, Inc., a California Corporation, to recover maintenance and wages allegedly due by reason of the fact that appellee fell ill while employed as a fisherman by the appellants. [T. R. pp. 3-7.] A Libel for maintenance, cure and wages being historically maritime, Federal jurisdiction was invoked under the General Admiralty and maritime jurisdiction of the District Court of the United States. (28 U. S. C., Sec. 1333.)

This is an appeal by the Appellants from a judgment of the United States District Court in and for the Southern District of California, Central Division, decreeing that appellee recover from appellants the sum of \$5,423.34, together with costs entered on April 11, 1961 [T. R. p. 13], after the case was submitted for trial by the Court without a jury, and it rendered its findings of fact and conclusions of law, upon which it entered the above judgment. [T. R. pp. 11-13.] A motion for a new trial [T. R. p. 14] based in part upon the attached oral findings of fact made by the Honorable Trial Court [T. R. pp. 15-24] was filed by appellants on April 20, 1961, and on May 17, 1961, the Court's Order denying the Motion for a New Trial was filed. [T. R. p. 25.]

This appeal followed, having been commenced by a Notice of Appeal from this judgment which was timely filed on June 2, 1961 [T. R. p. 25], together with Appellants' Statement of Points on Appeal. [T. R. p. 26.]

The jurisdiction of this Court to entertain this appeal is founded upon 28 U. S. C., Section 1291, which confers appellate jurisdiction in Admiralty cases upon the United States Court of Appeals.

Statement of the Case.

Nikola Strika, Libelant, had been a fisherman for thirty years, having fished six years in the old country and twenty-four years on the California and Mexican fishing grounds. He is a big man, heavy and obese, who moves and works slowly. He is 49 years old. In September of 1959 he started fishing aboard the *Liberator*, a commercial fishing vessel with a crew of eleven fishermen under the command of Respondent, Joe Dragich, master of the vessel. Libelant was discharged by Mr. Dragich on January 18, 1960, when the crew demanded that he relieve him of his duties because he was slow and could not do the work required and keep up with the others. Libelant returned shortly thereafter with a "fit for duty" slip from the U. S. Public Health Service, dated January 18, 1960, to prove that he was all right because he was trying to go out for more fishing and he felt pretty fair. Mr. Dragich refused to rehire him.

Libelant, after extensive tests and examinations is found to be suffering from Parkinson's Disease. His medical history and all the evidence bearing on the issue indicate that the condition was one which existed prior to his signing on the *Liberator* and had been in existence during the times that the U. S. Public Health Service had examined him and found him fit for duty in 1947, 1948, and on January 18, of 1960, after he was discharged. He had suffered from heat prostration on his second and last voyage, but this incident did not constitute an illness and it is in no way connected to or related to the pre-existing Parkinson's Disease. The oral findings of the Honorable Court below are somewhat clouded by the Court's examination of whether or not Libelant was discharged for

cause on January 18, 1960, but the analysis and review of the evidence bearing on the issue of whether or not the Libelant fell ill while in the service of the vessel was so well done that it brings the picture of this case into exact and perfect focus:

The Court: This is a very unusual case. In a sense it appears on the surface to be just the ordinary case for maintenance and cure and for wages, but it has an element in it, of course, that makes it entirely different, and that's the fact that he was discharged. * * *

Frankly, it appears to me from the evidence that he did not fall ill in the service of the ship. But it also appears to me that he was not discharged for cause. * * *

* * * with respect to his illness, he wasn't ill at the time he left the service of the ship.
* * *

If you would call it an illness, he was ill before he went on the ship, but he was not ill in the sense that he could not work. From your own argument he could work at the time that he went on the ship. For instance, the report that you refer to is very significant. He, himself, the history given by the libelant himself, 'The patient is a 49 year old American seaman *who has noticed in the past two years inability to laugh, thick speech, slowing of movement, excess tearing of eyes, forward falling over on walking with resulting increase in gait, difficulty keeping eyes open, drooling at the corners of the mouth, generalized tiredness and what the patient describes as no happiness*'—for two years he has been noticing that. The testimony

of those who knew him before say it existed at that time. That doesn't mean he was ill in the sense that he could not work, because he did work. Mr. Dragich who employed him says he employed him, and testifies from the very beginning he didn't work any different than he did at the time when he finished his service on the ship. He says it appeared to him at all times that he worked in that fashion. He says he is a big man, he is heavy, and several times from the stand he said if you look at him you will see he is a big man, he does everything slow. All the reports show obesity, he is obese, he is fat, always has been, he is slow working, so of course from the very beginning—incidentally, Mercovitch wasn't with him on the second trip. Mercovitch signed this on the basis of the first trip. And the testimony is very clear that there wasn't much difference between the first trip and the second trip. And after the second trip was over the libelant goes up to the doctors and he tells the doctors he is all right, and they examine him and they agree that he is all right, there is nothing wrong with him. He doesn't tell them this history, although they have it, certain portions of it. In fact, in the early history it is shown back in 1957—it is part of the history, if you look back you will find that it is part of the history, this same thing, which they subsequently in September 1960 diagnosed as Parkinson's. This was subsequent, in 1960. This was in here, he always had this, but even the doctors didn't know it because he still could work, and when he came in and told them, 'I could still work,' they gave him a fit-for-duty slip, because as long as he could work they let him continue to work.

This may have progressed slowly, but it wasn't any different from what he had had for years. As he himself stated, and as the doctors certified in their fit-for-duty slip, he was fit and ready to go for duty on January 18, 1960.

Now, of course, we come to this question. They say he is fit for duty, and he says he is fit for duty, but Mr. Dragich fires him, and he says he fires him because he can't do the work. The point is that he is fit for duty, for just as much duty—from Mr. Dragich's own words—as he was the day he hired him. * * * But he says, then, he was a slow worker, he was big, he was heavy, he was a slow worker. And he continued to be a slow worker, and he couldn't keep up with the young fellows.

And I don't doubt but what that is perhaps correct.

Then of course that brings up this question: Can you employ a man who is a slow worker, for the fishing season, and then in the middle of the fishing season because he is just what you employed to start with, a slow man, because the other fishermen are complaining, can you fire that fellow? Can you fire him just because there are complaints about him? Can you fire him just because he is slow?

As Mr. Dragich says, he had been doing the same work, he had some complaints during the first trip, he had some complaints during the second trip, so he decided it was either to fire one man or sixteen or nine or whatever it was. So that he acceded to the demands of the others.

* * *

But that doesn't mean that an entire crew of older men couldn't fish. They wouldn't catch as many fish as the younger men because they couldn't work as fast, but they still could fish. And this man could fish.

He was hired and he shouldn't have been fired. He shouldn't have been fired as long as he could go out. He felt that he could go out, the doctors felt that he could go out, they gave him a fit-for-duty slip, so he wasn't fired for cause. That is not cause.

* * * He still could go out and work.

As I stated a moment ago, from Mr. Dragich's own statement, he could work just the same as he could work before, because he ended up January working about the same as he worked when he employed him in September.

So the judgment will be for the libelant for \$3,831.71, which is the amount which you have stipulated would be the wages that he would be entitled to if he is entitled to recover wages.

Mr. Karmelich: Your Honor, may I make a statement?

The Court: Yes.

Mr. Karmelich: I feel from your remarks—I may be incorrect, your Honor—that if your Honor feels there wasn't cause, that was a separate defense. The first defense was that he was not disabled. If Mr. Strika wants to recover these wages, then his cause of action is for wrongful discharge. This case is one for wages, maintenance and cure, because he was taken ill and became disabled.

The Court: This is for wages, maintenance and cure, and you have set out in this action as an issue in the case, 'Whether or not libelant fell ill while in the service of the vessel and left the vessel on account of such illness.' '2. Whether or not libelant was discharged for cause on January 18, 1960.'

* * *

The two of you got together and you stipulated that the amount that he would be entitled to if he is entitled to wages is \$3,831.71. What can be clearer than that?

Mr. Karmelich: Your Honor, may I say something further?

The Court: Yes.

Mr. Karmelich: The theory of the Complaint was wages, maintenance, and cure. The allegations of the Answer denied that this man was taken ill. The allegation of the Complaint is that this man is entitled to wages because he was taken ill. As an affirmative defense we do state this man wasn't taken ill, this man was discharged. There is no prayer, concerning the Complaint, that this man was seeking wages under any other theory than because of the fact that he was taken ill.

The Court: He is entitled to his wages if he was improperly discharged.

Mr. Karmelich: But that was not the Complaint. There is no cause of action—

The Court: In other words, you are saying, in effect, that I am wrong when I say there is a distinction between his discharge because he had the same affliction at the time he was dis-

charged that he had during the period when he was employed. You are making the argument for Mr. Finkel? Maybe it is right. Maybe I will take it under submission and think it over. If he is entitled to all of it, he is entitled to this. If it can be said that the discharge was improper, that he didn't have a right to discharge him, because—let me say that he did have a right to discharge him because of his slowdown, then his slowdown amounted to an illness and Mr. Finkel is right. Maybe I am wrong. If I am wrong, I am wrong because I am saying that he is not entitled to it.

I thought these issues were very clearly stated, but if you say that I can only determine it on that theory, then of course I do and will determine that the slowdown was an illness and therefore that he was ill at the time; and if he is ill he is entitled to maintenance.

All right. I will take it under submission.
* * *”

The District Court thereafter made findings of fact and conclusions of law to the effect that, among other things, libelant fell ill while in the service of the “U. S. LIBERATOR” and left said vessel on account of said illness and that libelant was not discharged for cause from said vessel by respondents on January 18, 1960. Based on the foregoing the District Court concluded that libelant was entitled to judgment against respondents and decreed that he recover from respondents for maintenance and wages for the remainder of his employment tenure aboard the vessel, and judgment in accordance with the foregoing was duly entered.

The error assigned by respondents and the sole error to be considered in this brief is that the District Court erred in its findings of fact and conclusions of law. Respondents contend that under the evidence presented at the trial the material allegations of libelant's libel and the pre-trial stipulation and conference order to the effect that libelant fell ill while in the service of the vessel and left the vessel on account of such illness is contrary to the evidence and is completely unsupported by the evidence introduced at the trial which was totally insufficient to show that libelant fell ill while in the service of the "U. S. LIBERATOR", and there is no evidence to sustain the judgment of the District Court herein. Respondents further contend that under the evidence presented at the trial the material allegations of respondents in the pre-trial conference order to the effect that libelant did not fall ill in the service of the vessel and did not leave the vessel on account of such alleged illness, but rather, was discharged for cause on January 18, 1960, were established and proved without contradiction. Respondents contend that the District Court, therefore, erred in not making direct findings in favor of respondents on those issues, and because of this failure the District Court erred in its resulting conclusions of law. Respondents take the position that as they were entitled to direct findings of fact in their favor on the above issues and that under the required findings of fact the resulting conclusions of law and judgment should have been in their favor, and, therefore, the material portions of the record will be the sum-

mary of the evidence bearing on the foregoing allegation of libelant and the defense interposed by respondents and the findings of fact, conclusions of law and the judgment of the District Court below.

Findings of Fact.

The District Court found, among other things, that:

1. Libelant fell ill while in the service of the "U. S. LIBERATOR" and left said vessel on account of said illness. And,

2. Libelant was not discharged for cause from said vessel by respondents on January 18, 1960. [T. R. pp. 11-12.]

Conclusions of Law.

From the findings the District Court made the following conclusions of law:

I.

Libelant is entitled to judgment against respondents decreeing that he recover from respondents \$1,440.00 for maintenance, plus interest in the amount of \$50.40; and wages for the remainder of libelant's employment tenture aboard the "U. S. LIBERATOR" in the amount of \$3,831.78 plus interest in the amount of \$101.16. Libelant is entitled to judgment against respondents in the total amount of \$5,423.34. [T. R. pp. 12-13.]

Judgment.

In accordance with the foregoing findings of fact and conclusions of law, it is ordered, and adjudged and decreed that libelant recover from respondents the sum of \$5,423.23, together with costs amounting to \$.....
[T. R. p. 13.]

Specification of Errors Relied On.

I.

The District Court erred in its findings of fact and conclusions of law, in not making a direct finding in favor respondents on the issue of whether or not libelant fell ill while in the service of the "U. S. LIBERATOR" and left said vessel on account of said illness, as an affirmative finding on this issue is completely unsupported by the evidence introduced at the trial.

II.

The District Court erred in its findings of fact and conclusions of law, in not making a direct finding in favor of respondents on the issue of the affirmative defense interposed by respondents in the pre-trial stipulation and conference order, to the effect that libelant was discharged for cause from said vessel on January 18, 1960.

Questions Presented.

The first question presented is whether or not a fisherman can be found to have fallen ill while in the service of the vessel where he suffered from a pre-existing Parkinson's Disease and as a result was slow in doing his work, and at the end of his second voyage was fired because the crew of younger and more vigorous men complained of his inability to do his job, where there was no showing of an aggravation of said pre-existing condition while he was in the employ of the vessel, and no accident occurred causing him injury and no illness grew measurably worse during the voyage than it had before, and immediately before signing on the ship and immediately after being discharged from the vessel libelant was certified as fit for duty by the U. S. Public Health Service.

The second question presented herein is whether or not a man who is discharged because of complaints about his slow work by his fellow crew members, though he insists that he is all right and able to work and produces a certificate from the U. S. Public Health Service certifying that he is fit for duty, which he secured on the day of his discharge, may be found to have fallen ill while in the service of the vessel though he was discharged on January 18, and his condition was not diagnosed as Parkinson's Disease until long after his discharge and this subsequent diagnosis is nowhere in the evidence connected in any way with his service on the vessel and the sluggishness and slow work existed prior to the commencement of his employment.

Statement of the Facts.

In the interest of an orderly presentation of the issues we shall summarize here only the evidence presented at the trial bearing on the issue of whether or not libelant fell ill while in the service of the vessel and left said vessel on account of said illness and whether or not libelant was discharged for cause from said vessel by respondents on January 18, 1960, which are material in connection with respondents' assignments of error herein.

1. Libelant's Testimony.

On direct examination Nikola Strika stated that he had been a fisherman for thirty years. [T. R. p. 33.] He had fished aboard the vessel "WESTERN STAR" for almost two years prior to September of 1959 when he quit and went to work for respondents. [T. R. p. 34.] He considered the respondents' vessel, the "U. S. LIBERATOR", to be a better boat than the "WESTERN STAR" because it had a sprinkler system and the fish did not have to be iced and this made it better than the "WESTERN STAR" as it was easier work. [T. R. p. 36.] Libelant states that he went on trip to Mexican waters on the "U. S. LIBERATOR" in September and October of 1959 and denies that he was sick and stated affirmatively that he did not think there was anything wrong with him and that he was working all kinds of work and was feeling all right at this time. [T. R. pp. 37-39.]

On his second trip early in December of 1959 they went fishing down past Acapulco, and during a set while he was working in 105 to 110 degree heat as stated by libelant to be "strong heat", he felt dizzy and fainted. [T. R. p. 40.] This was about 11:00 o'clock,

just before noon, and libelant was throwing porpoises out of the net into the water and pushing tuna down the hatch. [T. R. p. 41.] He and the cook were working together and when the fish were 150, 200 pounds, the two of them would throw them together and the smaller ones they would handle alone. The same day libelant experienced another attack of heat prostration, as, in his own words "Second time it was in the afternoon it happened, in strong *heat* it hit me in the head." [T. R. p. 42.] The following day while doing the same character of work at about 1:00 o'clock in the afternoon he fainted again. [T. R. pp. 45-46.] Libelant stated that he did lighter work for the next three weeks and he described his activities as follows:

"Most of the time we set, and when we don't set we probably looking for the fish. I hardly do nothing, sit and look for the fish. *If you find the fish, you set and then you work.*" [T. R. p. 47.]

When asked whether he did any light work before the fainting spells libelant gave the following response:

"Sometimes light, sometimes hard, sometimes easier, like always on a boat. You don't work hard all the time. Sometimes hard, sometimes easy." [T. R. p. 48.]

Mr. Strika stated that he had never been sick in his life, but he admitted that he felt *different* than when he was a young man, stating that "You cannot feel when you were young. You begin to feel *different*, that is true. But I was good to do my work, to do my job." [T. R. p. 49.] He described the way he felt *different* in the in the following language: "Feel kind of a little bit slow down a little bit, things like that, that is coming, that gets you, you are little different." [T. R. p. 49.]

Libelant stated that the times he fainted and until the ship came into the harbor he was feeling weak, dizzy and slow of motion and that he went for a check up by a doctor the second day after they got in because he was trying to go out fishing, and feeling pretty fair and he stated that the skipper told him he couldn't have him on the boat because he was sick and he ought to see a doctor. Libelant testified that he saw the doctor all of February and on February 29, 1960, he was sent to the Marine Hospital in San Francisco where he spent five weeks and eight doctors examined him and diagnosed his condition for the first time as Parkinson's Disease. [T. R. pp. 50-52.]

Cross-Examination of Libelant.

Libelant went to the U. S. Public Health Department for the first time on January 18, 1960, and at that time still wanted to go fishing and told them nothing and received a "Fit for Duty" card that first time. He then showed the card to Joe Dragich and told him that he was okay and wanted to go fishing and he stated that he was told "Nikola, you are a sick man, you better go see doctor. You cannot fish, you are a sick man." [T. R. p. 58.]

Redirect Examination.

After the boat got back to the harbor at the end of the second trip libelant was told that he couldn't stay on the boat because he couldn't do the work and he told Joe he wanted to go fishing with him and that he felt all right. That he thereafter went to get a general examination because he wanted to prove that he was all right to Joe Dragich who had told him that he was sick and that he couldn't do the work and that he should go to the doctor. He returned and showed the "Fit

for Duty” slip to Mr. Dragich, but was told that he didn’t believe it and was advised by Mr. Dragich to see another doctor. [T. R. pp. 61-62.]

Further Direct Examination.

Libelant was asked: “At any time during your voyage, either of your two trips, did you ever feel any physical changes taking place?” And he answered as follows: “I feel a little bit like this, slow down, you know how it is.” He stated he felt the worst on the second trip. [T. R. p. 70.]

Recross-Examination.

On recross-examination the following occurred [T. R. p. 71]:

“Q. Mr. Strika, you stated you felt worse on the second trip. You didn’t feel good on the first trip, either, did you? A. I felt pretty good. I was doing my work.

Q. You say you felt pretty good? A. I feel all right.

Q. What was wrong with you? A. There was nothing wrong, I guess.

Q. You said you felt worse on the second trip. Now, what was wrong with you physically on the first trip? A. There was nothing wrong, I don’t think so. Just I feel a little slow.

Q. You felt a little slow? A. Yes.

Q. What made you feel a little slow? A. I don’t know.”

Mr. Strika again affirmed that on January 18, he went to the U. S. Public Health doctors in San Pedro, California, and that he went there for one purpose—to prove to Mr. Dragich that he could handle the job. [T. R. p. 74.]

2. Testimony of Rudolf F. Kuzmanich.

Direct Examination.

Mr. Kuzmanich testifying as a witness on behalf of libelant stated that as he recalled Mr. Strika was engaged in working on the cork pile and that he also engaged *all the rest of the activities* on board the boat that involved any of the process of fishing during the fishing trip late in September, 1959. [T. R. p. 78.]

The witness stated that he remembered that libelant on the second trip was doing initially the same work he started out with on the first trip, working on the corks and that when approximately a third of the way through this second trip it was changed to another type of work. They had been fishing somewhere off Acapulco and the temperature was roughly 95 to 100 degrees when working in the day time and he stated that Mr. Strika was overcome with *heat prostration*. After they finished the set he observed Mr. Strika lying on top of a hatch cover and observed that he looked "like he was one step from death". [T. R. pp. 80-81.]

With reference to the second trip the witness observed that libelant's physical movements were very laborious and that observing him it seemed laborious for him to move and he had trouble getting around to such a degree that it was noticeable. Referring back to the first trip, the witness stated that with regard to the movements or physical appearance of Mr. Strika, that he recalled and remembered him as a big man who moved slowly, who did not have the reactions of a quick, young man; a big man who was strong and big. He stated that on the first trip he had complained about Strika. [T. R. p. 83.]

Mr. Kuzmanich stated that he had heard others complain about Mr. Strika with respect to his work during the first trip of the vessel and he recalled that the complaints he heard concerned slowness of movement basically. [T. R. pp. 84-85.]

The witness stated that he had signed a letter which was a statement that the crew members wanted Strika off the boat because he could not handle the job of fishing. [T. R. p. 87.]

Cross-Examination of Mr. Kuzmanich.

The witness admitted that he was presently suing Mr. Dragich. He had noticed libelant lighting a cigarette and observed that it would be slower than an ordinary person lighting a cigarette. He did not remember whether libelant would drool with saliva coming down the lower part of his mouth and onto his chin, but he did know that he was slower when he lit his cigarette and he noticed this throughout the first trip. [T. R. p. 92.]

3. Testimony of Joseph P. Dragich.

Mr. Dragich stated that he was one of the respondents, a part owner of the "U. S. LIBERATOR", and master of the vessel. He stated that he had seen the document designated as Respondent's Exhibit A for the first time when his crew demanded that he relieve Mr. Strika of duties on board the second trip. [T. R. pp. 94-95.]

He stated that he had known Mr. Strika for five or six years prior to hiring him and that he didn't think that there was any change in Mr. Strika's speech during this time and that his movements were always slow because he has been always a heavy man. [T. R. p. 96.]

He had observed the libelant during the three days it took them to get to the fishing grounds and he observed that he walked his usual slow walk, observing that he is sure-footed, and he stated that he observed that when Mr. Strika attempted to light a cigarette he had to light a second match many times because of the shaking of his hand and he noticed saliva coming out of the corners of his mouth. He didn't pay too much attention to this during the first trip until one of the members of the crew drew it to his attention. He stated that during the first trip his crew members complained to him about the work that Mr. Strika was doing. [T. R. p. 97.] Mr. Strika had insisted on taking care of the corks but as he could not stand up under the pace that the youngsters put up for him, he had to change him to the web for awhile. He couldn't even hold that up so he changed him to the lead line, then on the first trip he put him on the hook, taking care of the hook and the strap for awhile. [T. R. p. 98.]

He stated that he had a discussion with libelant after the crew had called the fainting incident to his attention and that Mr. Strika had said to him "It is nothing, it is just too darn hot down here," noting that the first trip was about 1200 miles further to the northwest and colder weather which did not bother libelant, he stated that libelant continued "That dog-gone heat down there, it is too much for me, I can't take it." He stated that Mr. Strika told him, "Right

now all I have got is a headache.” Mr. Dragich stated that the actions of libelant and his work were no different after than they were before the report of the fainting was made to him. [T. R. pp. 100-101.]

At the completion of the second trip, after they had unloaded the fish the witness stated that he was reluctant to let libelant go and that he told him that that was it, that he couldn't carry on, or else he had to stay up with the rest of the crew. [T. R. p. 101.] He stated that the following day when the crew presented him with the note signed by them he was forced to relieve libelant of his duties for it was either that or lose the rest of his crew which would be hard to replace. Thereafter libelant came up to him and stated that he had been to a doctor and presented a slip saying he could go fishing and was fit for duty but the witness stated he told him that he was sorry and showed him the paper signed by the crew stating “Whether you are fit for duty or not, it is easier to find one man than it is to find another ten.” [T. R. pp. 102-103.]

Cross-Examination of Joseph P. Dragich.

During the cross-examination of Mr. Dragich the following transpired:

“Q. Did you have occasion to observe his physical movements after that fainting report? A. Approximately the same as before.

Q. Will you describe the physical movements that you saw, please? A. I have already described one incident. I don't know how much more you

want me to. But his movements were identical to those of the first or the second trip.” [T. R. p. 109.]

Mr. Dragich then stated that he had talked to libelant about the complaints of the crew members while they were coming in on the vessel on the first trip and he stated that he had observed Mr. Strika drooling on the first trip after they were out about a week and someone called it to his attention, stating that he thought after dinner it was more noticeable than any time of the day. He also stated that he noticed that he had a glassy stare, and that to the best of his ability, as far back as he could recall him he always had that. He stated that aside from his stutter the libelant always sort of was dragging his words out except when singing, stating that he used to be quite a singer, but that was probably four or five years ago. [T. R. pp. 111-112.]

4. Testimony of Nicholas A. Mirkovich.

Mr. Mirkovich testifying as a witness on behalf of respondents, stated that he had been on the first voyage of the vessel and that he had not been aboard the vessel on the second trip which ended on January 13, 1960, and that during that first trip of the vessel he had noticed Mr. Strika aboard and observed that his movements were slow and that it would take him a little time longer to strike a match and light a cigarette and that sometimes he would drool saliva down his lower lip when he would take cigarette from his mouth. When

asked whether or not he complained about the work of Mr. Strika during the trip he responded that it was just slow, it was hard to keep up—it's hard for everybody else when one guy can't keep up and that this slowness prevented the rapidity of bringing in the net. [T. R. p. 114.]

The witness stated that as he remembered Mr. Strika was working on the corks during the first trip and he remembered seeing another crew member working on the corks once but didn't remember how often because he didn't pay much attention and had forgotten and couldn't recall whether libelant had ever handled the hook or the lead line or the web. [T. R. p. 115.]

The witness stated that he had signed respondent's Exhibit A after the second trip, but that he had not made the second trip because he had stayed home for one trip because he was being examined to be inducted and had his cousin take the trip in his place, but not being inducted he had returned to the vessel. He stated that he signed the document because of his observation of libelant on the first trip. [T. R. pp. 115-116.]

Respondents' Exhibit A.

This document is the precipitating cause of libelant's discharge by respondents and it is merely a piece of paper with the statement to the effect that Nikola Strika is not capable of doing his work and we urge the skipper to relieve him of his duties. And this in turn is signed by the various crew members on the "U.S. LIBERATOR."

Libelant's Exhibit I—U. S. Public Health Service Medical Reports.

Libelant's Exhibit I is made up of two parts, the first part of the Exhibit being the medical reports covering Nikola Strika, libelant, from the period from January 1960 through to the time of the trial, and the second part being the records concerning Nikola Strika prior to January 18, 1960.

It should be particularly noted that the records indicate that as early as February 27, 1958, a doctor during an examination of Nikola Strika noted that libelant had a peculiar stare and an expressionless face.

As the complete record comprising libelant's Exhibit I in evidence is part of the record on appeal and is by its nature a terse form of report, no attempt will be made to summarize same here as it is felt that paraphrasing same would be of little value to this Court. The report speaks for itself and it should be read in its entirety and in its original form.

Argument.

I.

The District Court erred in its findings of fact and conclusions of law in not making a direct finding in favor of respondents on the issue of whether or not libelant fell ill while in the service of the "U. S. LIBERATOR" and left said vessel on account of said illness, as an affirmative finding on this issue is completely unsupported by the evidence introduced at the trial.

II.

The District Court erred in its findings of fact and conclusions of law, in not making a direct finding in favor of respondents on the issue of the affirmative defense interposed by respondents in the pre-trial stipulation and conference order, to the effect that libelant was discharged (for cause) from said vessel on January 18, 1960.

As the second error above can be disposed of quickly, it will be treated first in the argument herein.

A. Introduction.

In his petition libelant seeks maintenance and wages from respondents on the ground that libelant fell ill while in the service of respondents' vessel. The Pre-Trial Order sets forth that one of the issues of fact to be litigated is "Whether or not libelant was discharged for cause on January 18, 1960." This issue was made a part of the Pre-Trial Stipulation and Conference Order for the sole reason of explaining why the libelant left the ship and to negate the claim of illness by libelant.

B. Was Libelant Discharged on January 18, 1960, for a Cause Other Than Libelant's Having Fallen Ill While in the Service of the Vessel?

True, one of the issues of fact in the Pre-Trial Conference Order was whether or not the man was discharged for cause, but, as pointed out above, it was to negate the claim of illness of libelant, and in determining the affirmative relief sought the words "for cause" are surplusage. The most that can be said for the issue of whether this man was discharged is that this was a defense to the assertion and claim of libelant that he was taken ill and therefore left the vessel rather than leaving said vessel because he was discharged for some other cause.

When we look at and study the Pre-Trial Conference Order as a whole we must construe it as one document and not take part of the Order without relating it to the other provisions of the Order. As stated above, the Pre-Trial Order states that this is an action for maintenance and wages allegedly due by reason of the fact that libelant fell ill while employed as a fisherman by respondents. Therefore, the issues revolve around that question and the question is merely, "Was he taken ill?" or "Wasn't he taken ill?" Libelant's Exhibit I was in fact the cause for libelant being discharged as clearly established by the evidence in the case and was the reason he left the ship and not any supposed illness of libelant.

C. Libelant Was Not Taken Ill and Disabled in the Service of the Vessel so as to Entitle Him to the Benefit of Wages, Maintenance and Cure Because He Had the Same Affliction at the Time He Was Discharged That He Had During the Time When He Was Employed.

Respondents have no argument as to the established law that when a seaman (fisherman) falls ill while in the service of a vessel or is on call for duty by said vessel, he is entitled to wages, maintenance and cure. *Vitco v. Joncich*, 130 Fed. Supp. 945 (D. C. Cal., 1955), Affirmed 234 F. 2d 16 (C. A. 9th 1956).

In the instant case, even as the District Court noted, the evidence was to the effect that this man did not become ill during his employment aboard the vessel "U. S. LIBERATOR"; nor was his pre-existing Parkinson condition aggravated while he was in the employ of said vessel. The evidence supports the contentions of respondents that on both of the fishing trips that this libelant made he was not able to keep up with his work, but he was slow. This was true not only on the second voyage but likewise on the first voyage and the evidence shows that this man's work was the same on both voyages. On the first voyage the crew complained of libelant's work, as they did on the second voyage. Libelant himself testified that he felt there was nothing wrong with him and that he could continue working. He impressed this fact upon respondent Dragich, but despite his protestations, Mr. Dragich stated that his work was not satisfactory and that the crew was complaining and did not want to carry him along.

This man had a pre-existing Parkinson Disease and as the Public Health record disclose [libelant's Ex. I], this man man complained prior to his employment aboard the "U. S. LIBERATOR" of sluggishness, etc. This pre-existing disease slowed libelant's activities down to a point where he could not keep up with younger fishermen. This is evidenced by the fact that the crew of the "U. S. LIBERATOR" complained of his activities on the first trip. This slowness or failure to keep up with the rest of the crew did not occur subsequent to his fainting spell on the second trip, which did not constitute or amount to an illness and had nothing to do with the Parkinson syndrome or disease, but was merely heat prostration brought about by strenuous activity, but existed prior to the fainting spells. His work was no worse nor better on the second trip than it was on the first trip.

True, this Parkinson Disease was not diagnosed as such until this man left the employ of the vessel, but his slowness of movement and physical limitations were manifested long prior to the date that the Parkinson Disease was diagnosed. It is submitted, therefore, that unsupported by evidence or testimony that he fell ill in or as the result of his services aboard respondents' vessel, the mere fact that he was declared unfit for duty approximately four days after leaving the vessel supports no more than a speculative inference that he may have become ill in the service of the vessel. It is submitted that standing alone, such an inference is grossly inadequate to establish liability for respondents.

See *James Ray Joslin v. Steamship Duncan Bay, et al.*, 1958 A. M. C. 994 (Northern District of California, Southern Division, February 4, 1958).

In the *Joslin v. Steamship Duncan Bay* case, Joslin the libelant, within a day or so after he left the employ of the respondent's vessel, began receiving treatment again for an ailment of long standing and for which he had a long history of treatment prior to service aboard respondent's vessel. However, Joslin had apparently received no treatment for this ailment for some time prior to joining respondent's vessel, during which time he served aboard other vessels. The records divulged no history of illness aboard the other vessels either. Joslin was apparently fit for duty upon joining these other vessels and also upon joining respondent's vessel. There was no evidence on the *Joslin* case of his having been ill while on the service of respondent's vessel or of his having received any treatment after quitting the vessel, at least for any illness which may have arisen during his service aboard. The court in the *Joslin* case concluded that respondents were not liable for maintenance, and the court held, "Unsupported by testimony or documentary evidence that the seaman fell ill in or as the result of his service aboard respondent's vessel, the mere fact that he was hospitalized by United States Public Health Service within a day or two after leaving the vessel supports no more than a speculative inference that he may have become ill in the service of the ship and that his subsequent treatment resulted therefrom. Standing alone, such an inference is grossly inadequate to establish liability for vessel maintenance."

In the instant case libelant had complained to Public Health of sluggishness and slowness long prior to his employment aboard respondents' vessel. This sluggishness and slowness did not show up for the first time aboard respondents' vessel as evidenced by the

U. S. Public Health records in evidence in this matter. [Libelant's Ex. I.] Thus, it is respondents' contention that the application of maintenance and wages to a seaman should not apply in this case where no illness grew measurably worse during the voyage than it had been before.

See *John Fardy v. Trawler Comet Inc.*, 1955, A. M. C. 2100, 134 Fed. Supp. 528.

In the *Fardy v. Trawler Comet Inc.* case the court held that "This case falls squarely upon the decisions holding that a seaman is bound to disclose to a prospective employer the existence of a disease which he knows is likely to incapacitate him." The court states that it has serious reservations about the application of maintenance to a seaman shipping out of his home port and returning to that port at the end of the voyage, where no accident occurred and no illness grew measurably worse during the voyage than it had been before, and the court in that case denied liability on the part of respondents for maintenance.

In the Sixth Paragraph of libelant's First Cause of Action in the libel filed herein [T. R. pp. 4-5] libelant alleges that on or about January 18, 1960, while aboard said vessel and while acting in the course and scope of his employment as such fisherman, libelant fell ill of generalized cerebral arteriosclerosis Parkinson's secondary thereto and disastasis, and was forced to, and did, leave the vessel on or about January 18, 1960. Libelant has completely failed to sustain and carry the burden of proof on this issue as all he has shown with regard thereto is the U. S. Public Health Service medical records in evidence herein as libelant's Exhibit I, and this merely shows that he was diagnosed as having this

condition some time subsequent to his leaving the vessel and this report and the other evidence of the case shows that the condition pre-existed his employment by the respondents on the vessel "U. S. LIBERATOR". Nowhere in the entire record are the fainting spells shown to be anything but heat prostration suffered because of strenuous activity by the libelant and extreme and high heat, and no way is this connected to or related to the subsequent diagnosis of Parkinson's Disease which is claimed to be the basis of libelant's claim herein.

Conclusion.

For the foregoing reasons, the judgment below should be reversed with directions to dismiss the petition with costs in all courts to respondents.

Respectfully submitted,

KARMELICH, FELANDO & MEPHAM,

By ROBERT J. MEPHAM,

Proctors for Appellants.

APPENDIX.

Table of Exhibits.

<u>LIBELANT'S EXHIBITS</u>	<u>Transcript of Record Page</u>		
	<u>Identified</u>	<u>Offered</u>	<u>Received</u>
Exhibit No. I—			
U. S. Public Health			
Medical Records			
From 1/19/60 Hence	64	64	64
Exhibit No. I—			
U. S. Public Health			
Medical Records			
Prior to 1/19/60	66	66	66
<u>RESPONDENTS' EXHIBIT</u>	<u>Transcript of Record Page</u>		
	<u>Identified</u>	<u>Offered</u>	<u>Received</u>
Exhibit A—			
Document signed			
by Crewmembers			
Requesting Libelant			
Be Relieved	93	92	92

No. 17500 ✓

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

JOE DRAGICH and VAN CAMP SEA FOOD COMPANY, INC.,
Appellants,

vs.

NIKOLA STRIKA,
Appellee.

APPELLEE'S BRIEF.

MARGOLIS & McTERNAN,
By DAVID B. FINKEL,
Suite 203,
3175 West 6th Street,
Los Angeles 5, California,
Proctors for Appellee.

FILED

MAR 26 1962

FRANK H. SCHMID, CLERK

TOPICAL INDEX

	PAGE
Statement of the jurisdictional facts.....	1
Statement of the case.....	1
Summary of argument.....	7
Argument	8

I.

The trial court correctly ruled that libelant fell ill while in the service of the respondents' vessel and left said vessel on account of said illness.....	8
---	---

II.

The oral comments of the trial judge made at the conclusion of the trial should not be considered on appeal.....	11
Appendix. Table of exhibits.....	App. p. 1

TABLE OF AUTHORITIES CITED

CASES	PAGE
Aguilar v. Standard Oil Co., 318 U. S. 724, 87 L. Ed. 1107....	8
Balasco v. Chick, 84 Cal. App. 2d 802.....	10
Calmar Steamship Corp. v. Taylor, 303 U. S. 525, 82 L. Ed. 993	8, 9
Cordes v. Weyerhaeuser Steamship Co., 75 Fed. Supp. 537..8,	9
Danstrup v. The R. P. Hobson, 118 Fed. Supp. 453.....	8
Dell v. Hjorth, 51 Cal. App. 2d 576.....	11
Fisk v. Casey, 119 Cal. 643.....	11
Fuentes v. Panama Canal Co., 146 Fed. Supp. 303.....	9
Lindquist v. Dilkes, 127 F. 2d 21.....	9
Lord v. Katz, 54 Cal. App. 2d 363.....	11
Moran v. Bromley, 112 Cal. App. 2d 520.....	10
Phillips v. Hooper, 43 Cal. App. 2d 467.....	11
The Betsy Ross, 145 F. 2d 688.....	8
The Bouker No. 2, 241 Fed. 831.....	8
The Laura, Fed Case No. 10092.....	8
Titus v. The Santorini, 258 F. 2d 352.....	11
United States v. Oregon State Medical Soc., 343 U. S. 326, 96 L. Ed. 978.....	10
Vitco v. Joncich, 130 Fed. Supp. 945, aff'd 234 F. 2d 161.....	8
Weiss v. Central R.R., 235 F. 2d 309.....	9
Wilcox v. Sway, 69 Cal. App. 2d 560.....	11

RULES

Federal Rules of Civil Procedure, Rule 52(a).....	10
---	----

STATUTE

Code of Civil Procedure, Sec. 1847.....	10
---	----

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NIKOLA STRIKA,

Appellee.

APPELLEE'S BRIEF.

Statement of the Jurisdictional Facts.

Appellee adopts the Statement of Jurisdictional Facts set forth in Appellants' Opening Brief. (Appellants' Op. Br. pp. 1 and 2.)

Statement of the Case.

This being an appeal based on the sole ground that there was no evidence adduced at trial to support the findings of the trial judge, libelant-appellee feels compelled to set forth his own statement of the case, rather than adopt that of appellants, because appellants improperly omitted in their statement to set forth the evidence introduced at trial by libelant-appellee in support of his cause of action.

The pleadings (including the pre-trial conference order) may be summarized as follows:

Libelant-appellee is a fisherman, and prior to January 18, 1960, he was hired as a member of the crew of respondents' vessel, the "U. S. LIBERATOR" for the tuna fishing season ending on or about June 30, 1960, with wages in the form of a share of the catch. [Tr. 4.] While in the service of said vessel libelant became ill and as the result of said illness was forced to leave said vessel on or about January 18, 1960. [Tr. 5.] Libelant was thereafter found to be unfit for further sea duty, and in need of, and he did receive, medical care and cure up to the time of the filing of the libel. [Tr. 5.] Libelant sought maintenance at the rate of \$8.00 per day for each day of cure (not including days spent in the hospital), and a full share of the proceeds of the catch of said vessel for the balance of his employment tenure. [Tr. 5.]

Appellants admitted ownership of the vessel, but denied that libelant fell ill while in the service of the vessel. Appellants claimed that libelant was discharged for cause on January 18, 1960. It was stipulated that the contractual period of libelant's employment was for the 1960 tuna fishing season beginning on January 1, 1960 and ending on or about June 30, 1960. [Tr. 9.] It was further agreed that libelant was entitled to \$8.00 for each day of maintenance due him. [Tr. 9.]

At trial it was stipulated that if libelant was entitled to wages, the amount thus due him was \$3,831.78. [Tr. 66.]

All of libelant's allegations were found to be true by the trial court. It was found that libelant was entitled to 180 days of maintenance, or \$1,440.00, and \$3,831.78 as his share of the catch of said vessel, plus interest. The court also found that libelant was not discharged for cause by respondents.

At trial, libelant introduced evidence to the following effect:

Respondent Dragich called libelant one Sunday morning in September 1959, and asked libelant to join the crew of the "U. S. LIBERATOR", in response to which libelant quit his position as a member of crew of the "WESTERN STAR" and joined the crew of the "U. S. LIBERATOR". [Tr. 35, 103.] Libelant, having just completed almost two years of fishing aboard the "WESTERN STAR," entered the service of respondents' vessel thinking himself fit for duty. [Tr. 56.] Indeed, respondent Dragich also thought libelant fit for duty at that time. In fact, Mr. Dragich testified that he thought he hired an able-bodied, healthy seaman when he hired libelant, and he based his belief on what he knew about libelant in the past and what he had observed of him up to that time. [Tr. 105.] It is significant to note that Mr. Dragich knew libelant for about five years prior to hiring him. [Tr. 103.]

Libelant left the "WESTERN STAR" after almost two years [Tr. 34] of doing a crew member's work of all kinds aboard her. [Tr. 35-36.] During that time he never had to stop working while the other members of the crew worked. [Tr. 36.]

Libelant joined the crew of the "U. S. LIBERATOR" in September, 1959, and was rehired for the 1960 tuna fishing season ending on or about June 30, 1960. [Tr. 9.]

Libelant's first trip aboard the "U. S. LIBERATOR" lasted from September to October, 1959. [Tr. 37, 74-75.] On that first voyage libelant worked "piling cork" [Tr. 37, 72, 78, 115], ". . . which is one of the hardest sections of the net to work." [Tr. 28.] Libelant worked

on "the corks" throughout the first trip. [Tr. 72.] His work assignment was not changed during the first voyage. [Tr. 85.] At the end of the first trip libelant participated in the work of unloading the catch by working down in the hatches of the ship loading fish into buckets. He also carried buckets of fish. This was work that the entire crew participated in. [Tr. 38-39, 79-80.] At all times throughout the first trip libelant felt all right and did his work. [Tr. 38.] No one complained to libelant about his work during the first trip or during the unloading job at the end of the first trip. [Tr. 37, 39.]

Libelant remained a member of the crew of the "U. S. LIBERATOR" and sailed aboard her again (second voyage) in October, 1959. [Tr. 39, 80.] As the second trip began libelant continued doing the same work he had done on the first trip *i.e.*, "working the corks." [Tr. 80.] Approximately one-third of the way through the second trip, when the "U. S. LIBERATOR" was fishing in 100° heat somewhere off the shore of Acapulco, Mexico, libelant was overcome with what a member of the crew called "heat prostration" [Tr. 81] and he fainted two or three times on successive days. [Tr. 40, 42, 44, 81.] He lost his color [Tr. 81-82] and "was just glassy." [Tr. 81-82.] His physical movements slowed down considerably. [Tr. 82.] He had trouble getting around to such a degree that it was very noticeable. [Tr. 83.] That marked change and slowdown took place after libelant suffered the aforementioned period of "heat prostration." [Tr. 83.] Members of the crew complained that "this heat was too much for him, that he was too ill." [Tr. 86.] Libelant then heard murmuring and complaining that he was unable to do his work. [Tr. 52.]

At that time libelant was removed from “the corks” and was placed on the lead line “. . . which was an easier job than the corks. He could not even handle the lead line, and was put on the hook, which was the simplest job on the boat, and this was even an effort for him.” [Tr. 87.] Libelant felt weak and dizzy subsequent to his fainting spells. [Tr. 50.]

When the “U. S. LIBERATOR” returned to San Pedro and unloaded at the end of the second trip, the skipper of the “U. S. LIBERATOR” told libelant, on January 18, 1960, “I can not have you on the boat because you are sick. You better go see a doctor.” [Tr. 51, 55.]

When respondent Dragich told libelant that “You are sick, you can’t be on the boat, you go see a doctor” [Tr. 55], libelant went to see a marine doctor at the United States Public Health Service, at San Pedro, California (hereinafter referred to as “U.S.P.H.S.”), on January 18, 1960 [Tr. 60] with the hope of obtaining a fit for duty slip, because he still wanted to go fishing and hoped to convince respondent Joe Dragich that he was healthy enough to continue as a member of the “U. S. LIBERATOR”’s crew. [Tr. 62.] When libelant saw the marine doctor he asked for a general examination without stating his reason. [Tr. 61; Libelant’s Ex. 1, entry dated 1-18-60.] Libelant did not tell the doctor about the events of the second trip set forth above [See Libelant’s Ex. 1, indicating that U.S.P.H.S. first learned of libelant’s fainting episodes from respondents, and only *after* libelant was examined and given a fit for duty slip on January 18, 1960.] When libelant was examined at U.S.P.H.S. on January 18, 1960, he “told them nothing.” [Tr. 53, 57.] Upon receiving his fit for duty card, libelant went to respondent Dragich and

showed it to him, saying that "I am okay, I want to go fishing." [Tr. 57.] Respondent Dragich replied, "Nikola, you are a sick man, you better go see doctor. You cannot fish, you are a sick man." [Tr. 58.]

Four days later, libelant returned to U.S.P.H.S. in San Pedro for re-examination, this time with the history of his fainting and slowdown on the second trip revealed to the U.S.P.H.S. [Tr. 58; Libelant's Ex. 1, entries on January 22, 1960.]

As early as February 27, 1958, in the course of a general physical check-up of libelant by a marine doctor at U.S.P.H.S., libelant was noted (unknown to him [Tr. 56]) to have a peculiar stare, stolid expressionless face with mouth open, and speech a little thick. [Libelant's Ex. 1, entry dated 2-27-58.] A similar notation (again unknown to libelant [Tr. 56-57]) was made at that facility on November 24, 1958 and again on January 22, 1960, at which time libelant was declared unfit for duty. [Libelant's Ex. 1, entry dated Feb. 22, 1960.] Libelant's unfit for duty status was extended on February 11, 1960, and he was declared permanently unfit for duty on April 28, 1960. [Libelant's Ex. 1, entries dated Feb. 11, 1960 and April 28, 1960.] As a result of the examinations of libelant at U.S.P.H.S. commencing on January 22, 1960, he was found to have been (unknown to him [Tr. 56-57]) suffering from generalized arteriosclerosis with Parkinsonism secondary thereto, with diastasis, and libelant was hospitalized from February 29, 1960, through April 2, 1960. He was treated as an outpatient from January 22, 1960 through February 28, 1960, and from April 3, 1960, through September 30, 1960. On September 30, 1960, libelant was declared by U.S.P.H.S. to have

reached his maximum possible cure. The total number of said outpatient days was 180.

Fishermen, like the libelant here, are employed upon the basis of a share of the catch. [Tr. 8-9.] It was stipulated by both libelant-appellee and appellants that the amount of net earnings which libelant would have received as his share of the catch had he continued to fish aboard the "U. S. LIBERATOR" from January 18, 1960 through June 30, 1960, was \$3,831.78. [Tr. 66.]

Notwithstanding the evidence set forth above, appellants contend that there was no evidence introduced at trial to support the district court's finding that libelant fell ill while in the service of the vessel and left the vessel on account thereof. (Appellant's Op. Br. pp. 10, 12.) The trial court's rulings to the contrary and appellants' contention that the trial court was incorrect in so ruling pose the issue to be determined on their appeal.

Summary of Argument.

I. There was substantial evidence adduced at trial to support the trial court's findings that libelant became ill while in the service of respondents' vessel "U. S. LIBERATOR" and left the vessel on account of said illness.

II. The court of appeals should not consider the oral comments of the trial judge made at the conclusion of the trial in open court before the written findings of fact and conclusions of law and judgment were approved and filed.

ARGUMENT.

I.

The Trial Court Correctly Ruled That Libelant Fell Ill While in the Service of the Respondents' Vessel and Left Said Vessel on Account of Said Illness.

A fisherman who falls ill while in the service of his employer-shipowner's vessel is entitled to maintenance and cure as well as wages. Those entitlements are rooted in maritime law and are incidents of the fisherman's right of employment. *Vitco v. Joncich*, 130 Fed. Supp. 945 (1955), affirmed 234 F. 2d 161 (C. A. 9th 1956).

Libelant fell ill "while in the service of the vessel," as the authorities which define "in the service of the vessel" clearly establish. A fisherman falls ill "while in the service of the vessel" if he falls ill while generally answerable to the call of duty. *Aguilar v. Standard Oil Co.*, 318 U. S. 724, 87 L. Ed. 1107 (1943); *Danstrup v. The R. P. Hobson*, 118 Fed. Supp. 453 (1954). His illness need not have originated *during* the voyage. *The Betsy Ross*, 145 F. 2d 688 (C. A. 9th, 1944); *The Bouker No. 2*, 241 Fed. 831 (1917); *The Laura*, Fed. Case No. 10092 (1872). So liberally have the courts construed the proposition that the illness need not have originated during the voyage that maintenance and cure has been ordered in cases involving incurable ailments which are discovered after the commencement of the seaman's employ. *Calmar Steamship Corp. v. Taylor*, 303 U. S. 525, 82 L. Ed. 993 (1938); *Aguilar v. Standard Oil Co.*, *supra*; *Cordes v. Weyerhaeuser Steamship Co.*, 75 Fed. Supp. 537 (1946). In *Calmar*, *supra*, libelant stubbed his toe while aboard the vessel and

Buerger's Disease was discovered to exist upon his being examined *at the U.S.P.H.S. on shore, over one month later.* (See *Calmar Steamship Corp. v. Taylor*, 92 F. 2d 84, 85-86 (1937).) Libelant was awarded maintenance and cure as a result of that discovery. In *Cordes, supra*, libelant was found to have a tubercular condition which existed prior to his shipping out and was manifest while he was in the service of respondents' vessel. He was awarded maintenance and cure as a result thereof.

This rule has been applied even in cases in which a seaman believed that he had recovered from a prior condition but actually had not. *Fuentes v. Panama Canal Co.*, 146 Fed. Supp. 303 (1956). Accord: *Lindquist v. Dilkes*, 127 F. 2d 21 (1942); *Weiss v. Central R.R.*, 235 F. 2d 309 (1956).

In the case at bar, evidence was adduced at trial that libelant entered the service of respondents' vessel with an undiscovered history of what later was revealed by the U.S.P.H.S. to be Parkinson's Disease. Yet both libelant and respondent Joe Dragich, who hired him, thought that he was an able-bodied seaman.

Evidence was adduced at trial that during the tenure of libelant's first trip aboard the "U. S. LIBERATOR" he uninterruptedly performed heavy duty, and at the end of that first trip he participated in the unloading of the ship's catch. Libelant's evidence further showed that libelant began his second trip aboard respondents' vessel with the same job assignment, and without anyone complaining to him or speaking to him about his work or his physical condition. Finally, evidence was received that libelant experienced a physical change after suffering a series of fainting spells about

one-third of the way through the second trip. As a result, he felt weaker and slower. Libelant had to be, and was, switched from heavy to extremely light duty for the balance of the trip. At the end of the second trip libelant was told that he was sick by respondent Dragich and he visited the U.S.P.H.S., which resulted in his being declared permanently unfit for duty as a sufferer of Parkinson's Disease.

The above evidence was accepted by the trial court as credible and convincing. That evidence clearly supports and justifies the trial court's findings that libelant took ill "while in the service of the vessel," as that concept of "illness in the service" has been interpreted by the courts, and that libelant left the vessel on account of that illness.

An appellate tribunal does not sit as a jury to determine issues of fact, credibility of witnesses, or weight to be attached to testimony. *Balasco v. Chick*, 84 Cal. App. 2d 802 (1948); *Moran v. Bromley*, 112 Cal. App. 2d 520 (1952); *Cal. Code Civ. Proc.*, §1847. Likewise, where an action is tried by court without jury, findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses. *United States v. Oregon State Medical Soc.*, 343 U. S. 326, 96 L. Ed. 978 (1952); *Fed. Rules Civil Proc.*, Rule 52(a), 28 U. S. C. A.

The trial court having accepted as credible and true libelant's evidence that he took ill during the course of his service aboard respondents' vessel, and that the same caused his departure from that vessel, this appellate body cannot and should not disturb those findings.

II.

The Oral Comments of the Trial Judge Made at the Conclusion of the Trial Should Not Be Considered on Appeal.

It is well established that once findings are made, they supersede a previous opinion rendered by the trial court. *Titus v. The Santorini*, 258 F. 2d 352, 354-355 (C. A. 9th, 1958). In *Titus*, the trial court filed a written opinion. Thereafter that court approved and had filed findings of fact which on appeal were claimed to be inconsistent with the opinion. The court held that the function of the findings was to supersede the opinion, “. . . thenceforward the opinion having no more standing than random observations made by a trial judge in the course of a trial.” Oral statements made by the trial judge at the close of a trial can have no effect on the findings of fact which were signed and filed. *Wilcox v. Sway*, 69 Cal. App. 2d 560, 565 (1945); *Dell v. Hjorth*, 51 Cal. App. 2d 576, 579 (1942); *Fisk v. Casey*, 119 Cal. 643, 645 (1898); *Phillips v. Hooper*, 43 Cal. App. 2d 467, 470 (1941). It is settled that inconsistencies between antecedent expressions of the trial judge and the findings of fact cannot be considered by an appellate court. *Lord v. Katz*, 54 Cal. App. 2d 363, 367 (1942).

Conclusion.

Without attempting in any way to deal with or distinguish the evidence produced by libelant at trial, respondents ask for a reversal. They cite no authority and offer no reason in support of any position they

take. The record before this court does not suggest in any way that the trial court abused its authority in making its written findings. Accordingly the decision of the court below should be affirmed in its entirety.

Respectfully submitted,

MARGOLIS & McTERNAN,

By DAVID B. FINKEL,

Proctors for Appellee.

APPENDIX.

Table of Exhibits.

<u>LIBELANT'S EXHIBITS</u>	<u>Transcript of Record Page</u>		
	<u>Identified</u>	<u>Offered</u>	<u>Received</u>
Exhibit No. I			
U. S. Public Health Medical Records From 1/19/60 Hence	64	64	64
Exhibit No. I—			
U. S. Public Health Medical Records Prior to 1/19/60	66	66	66
<u>RESPONDENT'S EXHIBIT</u>	<u>Transcript of Record Page</u>		
	<u>Identified</u>	<u>Offered</u>	<u>Received</u>
Exhibit A—			
Document signed by Crewmembers Requesting Libelant Be Relieved	93	92	92

No. 17500

United States
Court of Appeals
for the Ninth Circuit

JOE DRAGICH and VAN CAMP SEA FOOD
COMPANY, INC.,

Appellants,

vs.

NIKOLA STRIKA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division

No. 17500

United States
Court of Appeals
for the Ninth Circuit

JOE DRAGICH and VAN CAMP SEA FOOD
COMPANY, INC.,

Appellants,

vs.

NIKOLA STRIKA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer to Libel.....	6
Certificate by the Clerk.....	27
Designation of Contents of Record on Appeal (U.S. Dist.)	26
Designation of Record on Appeal (U.S.C.A.).....	118
Findings of Fact, Conclusions of Law and Judgment	11
Judgment	13
Libel in Personam for Maintenance, Cure and Wages	3
Motion for New Trial, Notice of Hearing of Motion	14
Reporter's Transcript of Oral Findings of Court in Support of Motion.....	15
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	25
Order Denying Motion for New Trial.....	25
Pre-Trial Stipulation and Conference Order.....	8
Statement of Points on Appeal (U.S. Dist.).....	26
Statement of Points on Appeal and Designation of Record on Appeal (U.S.C.A.).....	118
Transcript of Proceedings.....	29

Testimony on Behalf of Libelant:

Kuzmanich, Rudolf F.	PAGE
—Direct	75
—Cross	91
—Redirect	93

Strika, Nikola

—Direct	33, 69
—Cross	53
—Redirect	60
—Recross	71

Testimony on Behalf of Respondents:

Dragich, Joseph P.

—Direct	94
—Cross	103

Mirkovich, Nicholas A.

—Direct	113
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NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

JOHN J. KARMELICH,
AUGUST FELANDO,

413 West Seventh Street,
San Pedro, California.

For Appellee:

MARGOLIS and McTERNAN,
DAVID B. FINKEL,

3175 West Sixth Street,
Los Angeles 5, California.

In the United States District Court
in and for the Southern District of California
Central Division

In Admiralty
No. 907-60-WB

NIKOLA STRIKA,

Libelant,

vs.

JOE DRAGICH and VAN CAMP SEA FOOD
COMPANY, INC., a corporation,

Respondents.

LIBEL IN PERSONAM FOR MAINTENANCE,
CURE AND WAGES

(Under 28 USC 1916, without prepayment of fees
of costs and without security therefor)

To the Honorable, the Judges of the Above Entitled
Court:

The libel of Nikola Strika, lately seaman aboard the fishing vessel "U. S. LIBERATOR," owned by the respondents above named, against said respondents, and each of them, and all persons intervening in their interests, in a cause of action for wages, maintenance and cure, civil and maritime alleges:

I

Libelant is now, and at all times herein material was, a seaman, and he elects to take advantage of the provisions of Title 28, USC Section 1916 to proceed herein without prepayment of fees or costs and without security therefor.

II

Libelant Nikola Strika and respondent Joe Dragich are residents within the Southern District of California and the Central Division thereof.

III

Respondent Van Camp Sea Food Company, Inc., is now, and at all times mentioned herein was, a corporation, duly organized and existing under and by virtue of the laws of the State of California with its principal place of business located at Terminal Island, California.

IV

Libelant is informed and believes and therefore alleges that the respondents Joe Dragich and Van Camp Sea Food Company, Inc., at all times material herein were the owners of the fishing vessel "U. S. LIBERATOR," and at all such times operated, maintained, supervised and controlled the said vessel.

V

At all times herein mentioned libelant was a fisherman employed by the respondents, and each of them, as a member of the crew of said fishing vessel at wages in the form of a share of the proceeds of the catch of said vessel. Libelant was employed by the respondents pursuant to an oral agreement of hire entered into prior to January 18, 1960, for the period of the 1960 tuna fishing season.

VI

On or about January 18, 1960, while aboard said vessel and while acting within the course and scope of his

employment as such fisherman, libelant fell ill of generalized cerebral arteriosclerosis, Parkinson's secondary thereto, and diastasis, and was forced to, and did, leave the vessel on or about January 18, 1960.

VII

By reason of the illness aforesaid, libelant was then and there disabled from working as a member of the crew of said vessel, and ever since January 18, 1960, he has been, and now is, disabled from working and will continue so to be for an indefinite and unknown period of time in the future. Libelant is entitled to and claims maintenance at the rate of \$8.00 per day from January 18, 1960, up to the time of the filing of this libel and for an indefinite period of time in the future. Libelant is not now informed of the exact amount of such maintenance and prays leave to amend this libel to allege and prove the same when it shall have been ascertained.

As and For A Second, Separate and Distinct Cause
of Action, Libelant Alleges:

I

Libelant incorporates and realleges the allegations of Paragraphs I, II, III, IV, V and VI of the first cause of action as if set forth fully herein.

II

By reason of the illness aforesaid, libelant was then and there disabled from continuing in his duties as a member of the crew of said vessel. Libelant is entitled to and claims a share of the proceeds of the catch earned by said vessel during the 1960 tuna fishing

season. The exact amount of such share is not known to libelant but is known to respondents and libelant prays that respondents be ordered to account for and pay over the same.

Wherefore, libelant prays judgment against respondents, and each of them, as follows:

1. For maintenance in such sum as hereafter may be ascertained.
2. For wages in such sum as hereafter may be ascertained.
3. For costs of suit incurred herein.
4. For such other and further relief as may be proper in the premises.

MARGOLIS and McTERNAN,
/s/ By BEN MARGOLIS,
Proctors for Libelant.

[Endorsed]: Filed Aug. 4, 1960.

[Title of District Court and Cause.]

ANSWER TO LIBEL

To the Honorable Judges of the United States District Court, Southern District of California, Central Division:

The respondents in answer to the allegations of the alleged First Cause of Action of the libel herein, allege as follows:

I.

Admit the allegations contained in Paragraphs I, II, III and IV.

II.

In answer to the allegations of Paragraph V, respondents admit the oral employment, but deny that he was employed for the 1960 tuna season and in this respect allege that he was employed up to and including June 30, 1960.

III.

Deny generally and specifically each and every other allegation contained in Paragraphs VI and VII.

Answer to Second Cause of Action:

I.

For answer to the allegations incorporated in Paragraph I of libelant's Second Cause of Action, respondents incorporate herein by reference each and every admission, denial and allegation of Paragraphs I, II and III of respondents' answer to libelant's First Cause of Action.

II.

Deny generally and specifically each and every allegation therein contained.

Wherefore, these answering respondents pray that libelant take nothing by his libel and that respondents recover their costs of suit and such other and further relief as the Court deems just.

KARMELICH and FELANDO,
/s/ By JOHN J. KARMELICH,
Attorneys for Respondents.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Aug. 26, 1960.

PRE-TRIAL STIPULATION AND CONFERENCE
ORDER

It Is Hereby Stipulated by and between the undersigned counsel pursuant to Rule 16 of the Federal Rules of Civil Procedure and Rule 9 of Local Rules as follows:

I.

This is an action for maintenance and wages allegedly due by reason of the fact that libelant fell ill while employed as a fisherman by the respondents.

The pleadings herein consist of the following:

1. Libel in Personam for Maintenance, Cure and Wages.
2. Answer to Libel.

II.

Federal jurisdiction is invoked under the General Admiralty Jurisdiction of this Court.

III.

The following facts are admitted and require no proof:

1. All parties are residents within the Southern District of California and the Central Division thereof.
2. The respondents Joe Dragich and Van Camp Sea Food Company, Inc., a California corporation, at all material times were the owners of the fishing vessel "U. S. LIBERATOR" and at all such time operated, maintained, supervised and controlled the said vessel.
3. For some time prior to January 18, 1960, libelant was a fisherman employed by the respondents as a member of the crew of the "U. S. LIBERATOR"

with wages in the form of a share of the catch of said vessel.

4. The period of employment for which he was hired was from January 1, 1960 to June 30, 1960 and any fishing trip commencing on or before June 30, 1960 and which may have ended after June 30, 1960, subject to discharge at any time for cause.

5. Libelant last served aboard the vessel on January 18, 1960.

6. If libelant is entitled to maintenance, it is agreed that the rate of maintenance is \$8.00 per day, each day that he was ill and not confined to a hospital.

IV.

The reservations as to the facts cited in Paragraph III above are as follows: None.

V.

The following facts not admitted are not to be contested at the trial by evidence to the contrary. None.

VI.

The following issues of fact and no others remain to be litigated:

1. Whether or not libelant fell ill while in the service of the vessel and left the vessel on account of such illness.

2. Whether or not libelant was discharged for cause on January 18, 1960.

3. The period of time, if any, during which libelant has been and is expected to be ill and receiving cure for his illness.

4. The amount of wages, if any, to which libelant is entitled from the time he left the vessel to the end of his period of employment.

VII.

Exhibits to be offered at the trial are as follows:

1. U. S. Public Health Service records.
2. Settlement sheets showing earnings during the term of employment.

VIII.

The following issues of law remain to be litigated:
None.

IX.

The foregoing admissions have been made by the parties and the parties having specified the foregoing issues of fact and of law remaining to be litigated, this order shall supplement the pleadings and govern the course of the trial of this cause unless modified to prevent manifest injustice.

Dated: This 5 day of December, 1960.

/s/ WM. M. BYRNE,

United States District Judge.

Approved as to Form and Content:

MARGOLIS and McTERNAN,

/s/ By BEN MARGOLIS,

Attorneys for Libelant.

JOHN J. KARMELICH and

AUGUST FELANDO,

/s/ By JOHN J. KARMELICH,

Attorneys for Respondents.

[Endorsed]: Filed Dec. 5, 1960.

In the United States District Court
In and for the Southern District of California
Central Division

In Admiralty
No. 907-60 WB

NIKOLA STRIKA,

Libelant,

vs.

JOE DRAGICH, et al.,

Respondents.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW, AND JUDGMENT

The above entitled cause came on regularly for trial on February 21, 1961, at in the above entitled court before the Hon. William M. Byrne, Judge presiding, sitting without a jury, this being an admiralty action, Margolis and McTernan by David B. Finkel appearing as attorneys for libelant, and John Karmelich appearing as attorney for respondents, and oral and documentary evidence having been introduced on behalf of both parties on February 21 and 23, 1961, briefs by both parties having been filed subsequent thereto, and the Court having considered the same and heard the arguments of counsel and being fully advised, makes the following findings of fact:

1. Libelant fell ill while in the service of the "U. S. LIBERATOR" and left said vessel on account of said illness.

2. Libelant was not discharged for cause from said vessel by respondents on January 18, 1960.

3. Libelant received outpatient cure from January 22, 1960, through February 28, 1960, and from April 3, 1960, through September 30, 1960. Libelant received inpatient hospital cure from February 29, 1960, through April 2, 1960. Throughout both said outpatient periods libelant was unfit for duty.

4. Libelant is entitled to maintenance at \$8.00 per day for 180 days covering the period of outpatient care mentioned in paragraph 3 above, making a total of \$1,440.00, plus interest thereon from September 30, 1960, in the amount of \$50.40.

5. The amount of wages to which libelant is entitled from the time he left the "U. S. LIBERATOR" to the end of his period of employment thereon is \$3,831.78, plus interest thereon from June 30, 1960, the amount of \$101.16.

6. Except as herein otherwise specifically found, all of the allegations of the libel are true and none of the allegations of the answer thereto are true.

Conclusions of Law

From the foregoing facts, the Court makes the following conclusions of law:

I.

Libelant is entitled to judgment against respondents decreeing that he recover from respondents \$1,440.00 for maintenance plus interest in the amount of \$50.40; and wages for the remainder of libelant's employment tenure aboard the "U. S. LIBERATOR" in the amount

of \$3,831.78, plus interest in the amount of \$101.16. Libelant is entitled to judgment against respondents in the total amount of \$5,423.34.

Judgment

In accordance with the foregoing findings of fact and conclusions of law,

It Is Ordered, Adjudged and Decreed that libelant recover from respondents the sum of \$5,423.34, together with costs amounting to \$.....

Dated: April 7, 1961.

/s/ WM. M. BYRNE,
Judge.

Approved As To Form:

This 3 day of April, 1961

JOHN J. KARMELICH and
AUGUST FELANDO,

by:

Attorneys for Respondents.

I acknowledge that I was personally served with a true copy of the above Findings of Fact, Conclusions of Law and Judgment on this 3 day of April, 1961.

JOHN J. KARMELICH and
AUGUST FELANDO,

/s/ By JOHN J. KARMELICH,
Attorneys for Respondents.

[Endorsed]: Lodged April 3, 1961. Filed April 7, 1961. Entered April 11, 1961.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL, NOTICE OF
HEARING OF MOTION AND ATTACHED
ORAL FINDINGS OF COURT IN SUPPORT
OF MOTION.

Respondents move the Court to set aside the Findings of Fact and Conclusions of Law and Judgment entered herein on the 11th day of April, 1961 in the docket, and to grant Respondents a new trial on the grounds that:

1. The judgment is contrary to the law;
2. The judgment is contrary to evidence;
3. The judgment is contrary to the law and evidence;
4. The judgment is contrary to the weight of the evidence and is completely unsupported by the evidence introduced at the trial which was totally insufficient to show that libelant fell ill while in the service of the "U. S. LIBERATOR", and there is no evidence to sustain the judgment of the Court herein, as evidenced by the Honorable Court's oral findings, which oral findings are attached hereto in support of the motion for a new trial.

This motion is based upon the records, pleadings, and proceedings in this and on the attached oral findings of fact made by the Honorable Court herein. The authority for this motion is rule 59(a) Federal Rules of Civil Procedure.

Dated: This 20th day of April, 1961.

KARMELICH and FELANDO,
/s/ JOHN J. KARMELICH,
Attorneys for Respondents.

In the United States District Court
Southern District of California
Central Division

No. 907-60-WB Admiralty

NIKOLA STRIKA,

Libelant,

vs.

JOE DRAGICH, et al.,

Respondents.

Honorable William M. Byrne, Judge Presiding.

REPORTER'S TRANSCRIPT OF
ORAL FINDINGS

Los Angeles, California
Thursday, February 23, 1961

Appearances: For the Plaintiff: David B. Finkel,
Esq., 3175 West Sixth Street, Los Angeles, California.

For the Respondents: John J. Karmelich, Esq., 413
West Seventh Street, San Pedro, California.

February 23, 1961, 9:45 o'Clock A.M.

* * *

The Court: This is a very unusual case. In a sense it appears on the surface to be just the ordinary case for maintenance and cure and for wages, but it has an element in it, of course, that makes it entirely different, and that's the fact that he was discharged. Of course, it makes it very difficult for counsel to argue, because both of you—you must carry water on both shoulders. You both have made some very accurate

and pertinent observations, but of course as you make one point it bears against you with respect to the other, because of course there are two main issues in this case. One is whether or not the libelant fell ill in the service of the ship, and the other is whether or not he was discharged for cause.

Frankly, it appears to me from the evidence that he did not fall ill in the service of the ship. But it also appears to me that he was not discharged for cause.

Now, when you stop to analyze the two, and that's why I say it is so difficult to consistently argue affirmatively on both, or negatively on both—first of all, with respect to his illness, he wasn't ill at the time he left the service of the ship. That is the thing, of course, that makes it difficult for the respondent, who must show a reason, cause for the discharge, but at the same time must establish that he was not ill at the time he left the ship, or perhaps he was ill before he ever went on the ship.

If you would call it an illness, he was ill before he went on the ship, but he was not ill in the sense that he could not work. From your own argument he could work at the time that he went on the ship. For instance, the report that you refer to is very significant. He, himself, the history given by the libelant himself. "The patient is a 49 year old American seaman who has noticed in the past two years inability to laugh, thick speech, slowing of movement, excess tearing of eyes, forward falling over on walking with resulting increase in gait, difficulty keeping eyes open, drooling at the corners of the mouth, generalized tiredness and what

the patient describes as no happiness"—for two years he has been noticing that. The testimony of those who knew him before say it existed at that time. That doesn't mean he was ill in the sense that he could not work, because he did work. Mr. Dragich who employed him says he employed him, and testifies from the very beginning he didn't work any different than he did at the time when he finished his service on the ship. He says it appeared to him at all times that he worked in that fashion. He says he is a big man, he is heavy, and several times from the stand he said if you look at him you will see he is a big man, he does everything slow. All the reports show obesity, he is obese, he is fat, always has been, he is slow working, so of course from the very beginning—incidentally, Mercovitch wasn't with him on the second trip. Mercovitch signed this on the basis of the first trip. And the testimony is very clear that there wasn't much difference between the first trip and the second trip. And after the second trip was over the libelant goes up to the doctors and he tells the doctors he is all right, and they examine him and they agree that he is all right, there is nothing wrong with him. He doesn't tell them this history, although they have it, certain portions of it. In fact, in the early history it is shown back in 1957—it is part of the history, if you look back you will find that it is part of the history, this same thing, which they subsequently in September 1960 diagnosed as Parkinson's. This was subsequent, in 1960. This was in here, he always had this, but even the doctors didn't know it because he still could work, and when he came in and told them, "I could still work," they gave him a fit-

for-duty slip, because as long as he could work they let him continue to work.

This may have progressed slowly, but it wasn't any different from what he had had for years. As he himself stated, and as the doctors certified in their fit-for-duty slip, he was fit and ready to go for duty on January 18, 1960.

Now, of course, we come to this question. They say he is fit for duty, and he says he is fit for duty, but Mr. Dragich fires him, and he says he fires him because he can't do the work. The point is that he is fit for duty, for just as much duty—from Mr. Dragich's own words—as he was the day he hired him. Mr. Dragich hired him, he says his wife talked to Strika's wife, so he hired him. He wasn't permitted to go into the details, but the inference is very clear, he testified that he talked to his wife and his wife talked to Mrs. Strika, and then on the basis of that he hires him. So the inference of course being that he wants to give him a job. But he says, then, he was a slow worker, he was big, he was heavy, he was a slow worker. And he continued to be a slow worker, and he couldn't keep up with the young fellows.

And I don't doubt but what that is perhaps correct.

Then of course that brings up this question: Can you employ a man who is a slow worker, for the fishing season, and then in the middle of the fishing season because he is just what you employed to start with, a slow man, because the other fishermen are complaining, can you fire that fellow? Can you fire him just because there are complaints about him? Can you fire him just because he is slow?

As Mr. Dragich says, he had been doing the same work, he had some complaints during the first trip, he had some complaints during the second trip, so he decided it was either to fire one man or sixteen or nine or whatever it was. So that he acceded to the demands of the others.

And I don't blame the others. If I were a fisherman and I were a young man and could work fast, and I get paid by the amount of work that I and my fellow fisherman do, I want young fishermen out there with me, too.

But that doesn't mean that an entire crew of older men couldn't fish. They wouldn't catch as many fish as the younger men because they couldn't work as fast, but they still could fish. And this man could fish.

He was hired and he shouldn't have been fired. He shouldn't have been fired as long as he could go out. He felt that he could go out, the doctors felt that he could go out, they gave him a fit-for-duty slip, so he wasn't fired for cause. That is not cause.

Would it be cause if some of these younger men whose names are on this slip, if for some reason all of them turned on one and said, "We don't want him working with us, we want you to relieve him of his duties"? Can they do that and this man would have no recourse?

He has a right to work, he was employed, unless there is real cause. And I say it isn't cause the mere fact that there are eight younger men on the vessel who can work faster, that is not cause. He still could go out and work.

As I stated a moment ago, from Mr. Dragich's own statement, he could work just the same as he could work before, because he ended up January working about the same as he worked when he employed him in September.

So the judgment will be for the libelant for \$3831.71, which is the amount which you have stipulated would be the wages that he would be entitled to if he is entitled to recover wages.

Mr. Karmelich: Your Honor, may I make a statement?

The Court: Yes.

Mr. Karmelich: I feel from your remarks—I may be incorrect, your Honor—that if your Honor feels there wasn't cause, that was a separate defense. The first defense was that he was not disabled. If Mr. Strika wants to recover these wages, then his cause of action is for wrongful discharge. This case is one for wages, maintenance and cure, because he was taken ill and became disabled.

The Court: This is for wages, maintenance and cure, and you have set out in this action as an issue in the case, "Whether or not libelant fell ill while in the service of the vessel and left the vessel on account of such illness." "2. Whether or not libelant was discharged for cause on January 18, 1960."

You have also stipulated the amount of wages, if any, to which the libelant is entitled from the time he left the vessel to the end of his period of employment, and you have stipulated as to the maintenance, which is out of the picture, and you have now entered into a

stipulation that if he was entitled to wages, he was entitled to receive the sum of \$3831.71.

Mr. Karmelich: Yes, your Honor, if he was entitled to wages under the maintenance and cure theory under the admiralty law.

The Court: I am not talking about any theory. I am talking about what has been stipulated to in this case, and under your pretrial order that we have here. We are trying this case under this pretrial order, and we have disposed of all the other issues.

One thing under this pretrial order is whether or not he is entitled to recover his wages, and one of the issues which you set forth here is whether or not he was discharged for cause. If he was not discharged for cause, what he is entitled to recover.

Mr. Karmelich: Your Honor, the following issues of fact and no others remain to be litigated: "Whether or not libelant fell ill while in the service of the vessel"—

The Court: Yes.

Mr. Karmelich: "and left the vessel on account of such illness."

The Court: Yes.

Mr. Karmelich: "The period of time, if any, during which libelant has been and is expected to be ill and receiving cure for his illness."

The Court: Yes.

Mr. Karmelich: "The amount of wages, if any, to which libelant is entitled from the time he left the vessel to the end of his period of employment."

The Court: Yes. You missed one very important one, and that is No. 2.

Mr. Karmelich: "The period of time, if any, during which libelant has been and is expected to be"—

The Court: No. Issue No. 2. That is issue No. 3.

Mr. Karmelich: I guess it was revised. "Whether or not libelant was discharged for cause on January 18, 1960."

That is one of the facts.

The Court: That is not a fact. That, Mr. Karmelich, is an issue in the case. In paragraph VI, "The following issues of fact and no others remain to be litigated:" As you just read—"1. Whether or not libelant fell ill while in the service of the vessel and left the vessel on account of such illness." And then skipping down to 3, "The period of time, if any, during which libelant has been and is expected to be ill and receiving cure for his illness." And you entered into a stipulation covering that on page 2. But, as I say, it is unimportant here for our purposes here, that is the maintenance, with respect to the discharge, whether or not libelant was discharged for cause on January 18, 1960.

"The amount of wages, if any, to which libelant is entitled from the time he left the vessel to the end of his period of employment."

If he was discharged for cause, he isn't entitled to any. If he wasn't discharged for cause, he is entitled to what he would have earned.

The two of you got together and you stipulated that the amount that he would be entitled to if he is entitled to wages is \$3831.71. What can be clearer than that?

Mr. Karmelich: Your Honor, may I say something further?

The Court: Yes.

Mr. Karmelich: The theory of the Complaint was wages, maintenance, and cure. The allegations of the Answer denied that this man was taken ill. The allegation of the Complaint is that this man is entitled to wages because he was taken ill. As an affirmative defense we do state this man wasn't taken ill, this man was discharged. There is no prayer, concerning the Complaint, that this man was seeking wages under any other theory than because of the fact that he was taken ill.

The Court: He is entitled to his wages if he was improperly discharged.

Mr. Karmelich: But that was not the Complaint. There is no cause of action—

The Court: In other words, you are saying, in effect, that I am wrong when I say there is a distinction between his discharge because he had the same affliction at the time he was discharged that he had during the period when he was employed. You are making the argument for Mr. Finkel? Maybe it is right. Maybe I will take it under submission and think it over. If he is entitled to all of it, he is entitled to this. If it can be said that the discharge was improper, that he didn't have a right to discharge him, because—let me say that he did have a right to discharge him because of his slowdown, then his slowdown amounted to an illness and Mr. Finkel is right. Maybe I am wrong. If I am wrong, I am wrong because I am saying that he is not entitled to it.

I thought these issues were very clearly stated, but if you say that I can only determine it on that theory, then of course I do and will determine that the slow-down was an illness and therefore that he was ill at the time; and if he is ill he is entitled to maintenance.

All right. I will take it under submission. Maybe I will write a little memorandum on it.

Both of you may write a memorandum. I didn't take the citations you gave me, so you may write memorandums. 10, 10 and 5. In other words, if you send me a memorandum, libelant may have 10 days for the opening memorandum, and you will have 10 days to answer it, and then you will have 5 days. And I am particularly interested in those cases relating to symptoms of illness prior to employment that culminate in serious illness during the employment.

Mr. Karmelich: Thank you, your Honor.

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 18th day of April 1961.

/s / SAMUEL GOLDSTEIN,
Official Reporter.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 20, 1961.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

Respondents' Motion for a New Trial having come on for hearing before the Honorable William M. Byrne, in the above entitled Court, on May 8, 1961, and Karmelich and Felando By John J. Karmelich appearing for respondents and Margolis and McTernan By David V. Finkel appearing for libelant both having been heard, It Is Hereby Ordered that said motion for new trial be, and it hereby is Denied.

Dated: May 17, 1961.

/s/ WM. M. BYRNE,

United States District Judge.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed May 17, 1961.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the respondents, Joe Dragich and Van Camp Sea Food Company, Inc., a corporation, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered herein.

Dated: this 31 day of May, 1961.

JOHN J. KARMELICH and
AUGUST FELANDO,

/s/ By JOHN J. KARMELICH,
Proctors for Respondents.

[Endorsed]: Filed June 2, 1961.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The points upon which Appellants will rely on appeal are:

1. The Court erred in finding that the Libelant was taken ill while in the employ of the vessel "U. S. LIBERATOR."
2. The Court erred in finding that any preexisting ailment became aggravated or reoccurred while the Libelant was in the employ of the vessel "U. S. LIBERATOR."
3. The Court erred in refusing to grant a new trial.

JOHN J. KARMELICH and
AUGUST FELANDO,
/s/ By JOHN J. KARMELICH,
Proctors for Respondents-Appellants,

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 2, 1961.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Pursuant to Rule 75(a), the Respondents—Appellants—hereby designate for inclusion in the Record on Appeal the following portions of the Record, proceedings and evidence in this action:

1. The Complaint
2. The Answer

3. The Pre-Trial Order
4. The Reporter's Transcript of the testimony at the trial of all of the witnesses
5. The Reporter's Transcript of the oral Findings of the Hon. William M. Byrne, Judge Presiding
6. The Findings of Fact and Conclusions of Law
7. The Judgment
8. The Respondents' Motion for new trial
9. The Order denying Respondents' Motion for new trial
10. The Notice of Appeal
11. This designation of Contents of Record on Appeal
12. The Statement of Points on Appeal.

JOHN J. KARMELICH and
AUGUST FELANDO,
/s/ By JOHN J. KARMELICH,
Proctors for Respondents-Appellants.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 2, 1961.

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the foregoing documents together with the other items, all of which listed below, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

Page:

- 1 Names and addresses of Attorneys
- 2 Libel, filed 8/4/60
- 5 Answer to Libel, filed 8/26/60
- 8 Pre-Trial Stipulation and Conference Order, filed 12/5/60
- 11 Findings of Fact and Conclusions of Law and Judgment, filed 4/7/61 and entered 4/11/61
- 14 Motion for New Trial, filed 4/20/61
- 31 Order denying motion for new trial, filed 5/17/61
- 33 Notice of Appeal, filed 6/2/61
- 34 Designation of contents of record on appeal (appellants)
- 36 Appellant's Statement of Points on Appeal
- 38 Appellee's Designation of additional portions of record on appeal, filed 7/6/61
- 40 Stipulation and Order extending time within which Appellants may file record and docket appeal, filed 7/11/61

One volume of Reporter's Transcript of Proceedings had on: February 21 and 23, 1961

Libelant's Exhibit No. 1

Respondent's Exhibit "A"

Dated: August 1, 1961.

[Seal]

JOHN A. CHILDRESS,

Clerk,

/s/By WM. A. WHITE,

Deputy Clerk.

In the United States District Court
Southern District of California
Central Division

No. 907-60 WB Admiralty

NIKOLA STRIKA,

Libelant,

vs.

JOE DRAGICH, et al.,

Respondents.

Honorable William M. Byrne, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California
Tuesday, February 21, 1961
Thursday, February 23, 1961 [1]*

Appearances: For the Libelant: Margolis and Mc-Ternan, by David B. Finkel, Esq. 3175 West Sixth Street, Los Angeles, California.

For the Respondents: John J. Karmelich, Esq. 413 West Seventh Street, San Pedro, California.

February 21, 1961, 9:45 O'clock A.M.

(Other court matters.)

The Clerk: No. 907-60 WB Admiralty, Nikola Strika vs. Joe Dragich, et al., for trial.

Mr. Finkel: Ready for the plaintiff, your Honor.

*Page numbers appearing at top of page of Original Transcript of Record.

Mr. Karmelich: I am ready under the circumstances. I do not have my witnesses, as I previously told your Honor.

The Court: Don't you have any of your witnesses?

Mr. Karmelich: No, your Honor. They are all out to sea.

The Court: How soon do you expect them back?

Mr. Karmelich: I was making interrogation yesterday of the Fishermen's Co-op Association, and they expect them within the next three weeks, because their license runs out as far as fishing.

The Court: Within the next three weeks?

Mr. Karmelich: Yes.

The Court: Then I will permit the plaintiff to put on his case and then I will put it over for three weeks.

Mr. Karmelich: Thank you, your Honor.

Mr. Finkel: If the court will permit, my case is whittled down to its bare essentials for the same reason that the defendant's case is. Part of my case is missing.

The Court: Where is your case? [4]

Mr. Finkel: I have my case with my client right here. The rest of my case is on the high seas for the same reason.

The Court: The same boat?

Mr. Finkel: No. Another vessel, two other vessels. I have one witness on call and I have my client here who I am prepared to base a case on if I have to.

The Court: You may put your case on. Inasmuch as it is a non-jury case, I will continue it for three weeks, and if you have any additional evidence, you may

put it on at that time, and the defendant may put on his case.

Mr. Finkel: I understand that, your Honor.
thank you for your consideration.

Mr. Finkel: May I proceed?

The Court: I don't want to extend it too long, because when a judge tries too many cases in the intervening time the facts are likely to get a little faint in your memory.

Mr. Finkel: Your Honor, I would like to make a request of the court. Inasmuch as this case is most likely to develop into a situation involving a bulk of witnesses being heard by the court at a future time, and one witness being heard by the court at this time, it is my judgment that such an approach places the plaintiff at a rather significant disadvantage, and if it is your intention to move the case [5] forward, I would request that the entire matter be moved forward.

The Court: Why would it?

Mr. Finkel: Because the plaintiff—the defendant in this situation is given three further weeks to establish an answer to a case which I must put on now and rely on, and it seems to me that that is like giving the defendant an extra opportunity for a pre-trial discovery after the trial has begun. I feel a sense of imbalance there and I ask your Honor whether or not it might not be more appropriate, since it is your intention to move the case forward for the purposes of the defendant's witnesses, to move the entire matter forward.

The Court: Frankly, I think you are unduly alarmed. There isn't any reason why the fact that there is a lapse of three weeks—we are interested in the facts,

and if the facts are uncovered in the three weeks, then I would want to hear them, and that's the reason that I stated to you that you also will have an opportunity to present any additional evidence in the three weeks. The point of course is that I don't want to lose this time.

Mr. Finkel: I understand that, your Honor.

The Court: One case was settled this morning. That case was supposed to be a jury trial that was going to last three or four days. It has gone up in smoke because they settled it. Now this case, Mr. Karmelich's client is out to [6] sea. Of course it is his own fault for going to sea when he has a case that is on the calendar. However, if I can, I would like to accommodate him so that the case could be heard on its merits.

It would seem to me if you are ready for trial that you would want to put your case on. Do you have medical testimony?

Mr. Finkel: I don't have medical testimony available today. We are relying primarily upon the United States Public Health Service records which have been subpoenaed.

Mr. Karmelich: Your Honor, that is the only medical. This man was treated by the United States Public Health, and they are on call. They can deliver the records. They are just upstairs.

Mr. Finkel: I am prepared to go forward if it is your Honor's desire that I do so.

The Court: As I have indicated, you will have an opportunity if you want to present further evidence.

you may do so when the matter is continued, on the continued date.

Mr. Finkel: Thank you.

The Court: I just want to get rid of the case. I want to try the case. All right. You may proceed.

Mr. Finkel: I call the libelant, Nikola Strika, to the stand, please. [7]

NIKOLA STRIKA

called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: Give us your full name.

The Witness: Nikola Strika.

The Clerk: S-t-r-i-k-a?

The Witness: Yes.

Mr. Finkel: May I proceed, your Honor?

The Court: Yes.

Direct Examination

By Mr. Finkel:

Q. Mr. Strika, what is your occupation?

A. Fisherman.

Q. How long have you been a fisherman?

A. I am a fisherman for 24 years in this country, and in old country.

Q. How many years would that total altogether?

A. 30 years.

Q. How long have you been fishing in the Southern California area?

A. I am fishing in South California and down Mexico for 24 years.

(Testimony of Nikola Strika.)

Q. Mr. Strika, I would like to call your attention to the calendar year 1959, if I may. I would like to ask you, sir, what fishing vessels did you exercise your occupation [8] aboard during the year 1959?

A. The WESTERN STAR.

Q. WESTERN STAR?

A. Yes.

Q. When did you begin your fishing on the ship the WESTERN STAR?

A. I fished there two seasons, two tuna seasons, two sardine seasons, two years.

Q. Do you remember about when you began on the WESTERN STAR?

A. I don't know exactly. I can't tell you.

Q. Do you remember when you stopped fishing on the WESTERN STAR?

A. Some time in September.

Q. September what year?

A. September '59, I believe. I quit WESTERN STAR and went fishing with Joe Dragich.

Q. You stopped fishing on the WESTERN STAR during September 1959? A. Yes.

Q. You don't remember when you began fishing on the WESTERN STAR? Can you tell us approximately how long you fished?

A. I fished almost two years on the WESTERN STAR.

Q. Will you tell the court very briefly how it came to pass that you stopped fishing on the WESTERN STAR during [9] September 1959?

A. I was still—

(Testimony of Nikola Strika.)

Mr. Karmelich: Objected to as immaterial.

Mr. Finkel: I think it is a foundational type of question. It may be that it is not pertinent to the exact issues of the case, but I think it lays a foundation upon which this case can best be understood. It is with that in mind that I ask the question. I think if the court understands just how this whole story began, it would be in a better position to evaluate it.

The Court: Overruled. It will be admitted as a preliminary question.

Q. (By Mr. Finkel): Tell the court how you came to stop fishing on the WESTERN STAR.

A. Joe Dragich called me one Sunday morning in September to come fishing with him. I quit WESTERN STAR to go fishing with Joe Dragich.

Q. By Joe Dragich, are you referring to the same Joe Dragich who is a respondent in this lawsuit?

A. Yes, that's right.

Q. When Mr. Dragich, according to your testimony, requested that you stop fishing on the WESTERN STAR and come fishing with him, what did you do? Did you comply with his request?

A. I quit WESTERN STAR and went fishing right next day, [10] we went for Mexico, it was a Sunday.

Q. Please speak very slowly and try to speak distinctly, Mr. Strika. A. I try my best.

Q. Mr. Strika, while you were fishing on the WESTERN STAR, what type of work were you doing?

A. All kinds, everything on deck, pull the net, push

(Testimony of Nikola Strika.)

the fish in hatch, ice the fish and everything else; I do everything.

Q. During the period of time which you were fishing on the WESTERN STAR, was there ever an occasion that you had to stop fishing when the other men on the vessel continued fishing?

A. Say it again.

Q. Let me repeat my question. Was there ever a time while you were fishing on the ship the WESTERN STAR when for any reason at all you had to stop fishing when all the other men continued to do their work, was there ever a time that you had to stop doing your work?

A. No, no, no.

Q. Now, will you tell the court what were the likenesses and what were the differences between the work that you did when you started fishing on the LIBERATOR in September of 1959 and the work that you did while you were fishing on the WESTERN STAR two seasons prior to September of 1959? [11]

A. WESTERN STAR we were icing fish with the ice, and LIBERATOR they have sprinkler system, you don't have to ice the fish with the ice, you throw fish in the ice and freeze it. It is a little better than the WESTERN STAR, it is easier work.

Q. Will you enumerate the most important and main jobs that you did on the LIBERATOR?

A. What do you mean "enumerate"?

Q. You started fishing on the LIBERATOR in September '59?

A. Yes.

Q. Tell the court what were the different things you did as part of your work.

(Testimony of Nikola Strika.)

A. I was piling cork, pulled the porpoises out of the net and throw them overboard, and took tuna from the net and put it in brine in the hatch.

Q. How many men were there in the crew on the LIBERATOR while you were working on the LIBERATOR in September of '59?

A. I think it was 10 or 11, I can't tell you exactly, 10 or 11 men, I am not sure; 10 or 11 men.

Q. When you first shipped out on the LIBERATOR, you said it was September '59, is that correct? A. Yes.

Q. After you shipped out, when is the first time that you came back to port after you shipped out September '59? [12]

A. I can't recall exactly the day, but it was late in October some time when we first came back home.

Q. Of what year?

A. Same year, 1959.

Q. October 1959?

A. I am not positive. I can't tell you exactly.

Q. While you were out on the LIBERATOR between September '59 and October '59, did you do all the jobs and all the work that you have just described?

A. Yes, I was doing it.

Q. Did anybody complain to you about your work during that time?

A. Nothing, nobody.

Q. During that period, still dealing with September '59 through October '59, did you feel sick at any time? A. No.

(Testimony of Nikola Strika.)

Q. Did you feel there was anything wrong with you at any time?

A. I don't think so. I was working all kinds of work, I was feeling all right.

Q. Did you have to stop doing your work for any reason?

A. No, nothing of the kind.

Q. Did anyone else have to do any of your work for you during that time?

A. No, sir. I do my work all the time. [13]

Q. Will you tell the court what happened when the boat came back? First of all, where did the boat come back when it came back to land in 1959? Did it come to San Pedro?

A. We stopped San Pedro slip, yes.

Q. What happened then?

A. That was first trip. You are talking about first trip?

Q. Yes, sir, from September to October '59.

Q. First time we stop in slip and then we drop fish—

Q. Speak slowly and tell the court what happened.

A. We stopped at fisherman's slip, and after I believe two, three days, we went back to Van Camp cannery on Terminal Island to unload the fish.

Q. When this unloading process went on, did you participate in that? A. Yes.

Q. Tell the court what you did during the unloading job.

A. I was on hatch, pick the fish up and put it in buckets and fish go out after. Pick the fish from the bottom and put it in buckets.

(Testimony of Nikola Strika.)

Q. Is that what all the men on the boat did?

A. Yes. Put it in buckets, and the bucket goes up and puts it in cannery.

Q. During the time you were doing the unloading work did you feel sick? [14]

A. No.

Q. Did you feel there was anything physically wrong with you?

A. No. I feel perfectly all right.

Q. Did anyone complain to you about the work you were doing during the unloading job?

A. No.

Q. Did anyone do any of your work for you during the unloading job? A. No.

Q. After the unloading work was done, what happened next with the LIBERATOR?

A. We went back in the slip for three, four days, five days, I don't know how long we went in port, then we went back to Mexico for the second trip.

Q. How long after the ship came in port after the first trip did it go out again on the second trip?

A. We stayed, I believe, a week in San Pedro, I can't tell exactly how long we stay, about a week, then we went back to Mexico.

Q. Will you tell the court what happened, if anything, during that week between the time you came in and the time you went out, other than the unloading job which you have already told us about?

A. Nothing happened. We finish work on the boat and [15] we was free for some time, we stay home, do nothing, and then after that we bring the boat

(Testimony of Nikola Strika.)

in slip and make fuel and groceries and went down to Mexico.

Q. How long would you say you were at home during that first week?

A. A week. I am not sure.

Q. When the LIBERATOR shipped out again, were the same men on the boat that were on it the first trip?

A. Second trip?

Q. Yes.

A. One man was different.

Q. Do you remember who that was?

A. One man was in somebody else's place, one guy stayed home to go in Army and another guy came in his place. That was the only change.

Q. Besides this one man who left the crew to go in the Army, everybody else was the same on the boat as best you remember?

A. I believe other man, too. Sam Carr, he came on the second trip.

Q. Will you describe to the court in your own words the second trip, what happened on the second trip? Where did you go?

A. Second trip we went fishing down past Acapulco, we was fishing there, and porpoises and big set, 105, 110 degree heat, strong heat, we was working, and I feel dizzy and I fainted. [16]

Q. Let me stop you right there. You fainted?

A. Yes.

Q. Up until that time while you were on the second trip did anybody complain about your work?

A. No, nothing.

(Testimony of Nikola Strika.)

Q. Did anybody do any of your work for you?

A. No. After I fainted, yes.

Q. I am talking about up until you fainted.

A. Before, nothing.

Q. Did you feel sick, did anything feel wrong with you?

A. I don't feel sick. I feel all right, I was doing my work.

Q. You say you fainted. Describe exactly what happened. Tell the court when it was and exactly what happened.

A. It was before noon, it must be before noon.

Q. How long had you been out, would you say?

A. Maybe 15 days out.

Q. What month was it?

A. That was in December when it happened, I believe, early in December.

Q. Early in December?

A. It must have been early in December. I feel dizzy and I fainted.

Q. What time of day was it?

A. It must have been around 10:00, 11:00 o'clock, be- [17] fore noon, something like that, 11:00 o'clock; I am not sure.

Q. What work were you doing or what were you doing at the time you fainted?

A. I was throwing porpoises out of the net in the water and pushing tuna down the hatch.

Q. Up until the time—

Mr. Karmelich: I am sorry. Could I have that last answer?

(The answer was read by the reporter.)

(Testimony of Nikola Strika.)

Q. (By Mr. Finkel): Was that job a job that you did alone, or was somebody else doing it with you?

A. Me and cook.

Q. Me and who?

A. Cook. Phillip Roman. When fish was 150 pounds, 200 pounds, big fish throw two men, and small fish throw alone.

Q. All right. Now, tell the court exactly what happened when you fainted.

A. After I fainted, after when I come back to myself, then I went in the bunk and laid down for a couple of hours and rest myself.

Q. Who saw you faint?

A. The crew, special that cook, Roman, he was right close to me. Everybody see it. That is not big ship. Everybody could see. It is maybe 50 feet, 30, 40 feet, everybody could see.

Q. What did you do for the rest of the day after you [18] fainted?

A. I took easy, sleep in the bunk, lay in the bunk and sit down and take it easy.

Q. What happened after that?

A. Second time it was in the afternoon it happened, in strong heat it hit me in the head.

Q. You are going a little too fast. What happened the next day?

A. The next day I fainted again.

Q. What time of the second day did you faint?

A. It must have been in the afternoon, some time in the afternoon.

(Testimony of Nikola Strika.)

Q. Will you tell the court what happened that morning of the second day before you fainted?

A. We was looking for fish.

Q. What were you doing?

A. Looking for the porpoises, for the fish, and when you find the fish, you set and then you work.

Mr. Finkel: May I have the answer?

(The answer was read by the reporter.)

Q. (By Mr. Finkel): Let me ask you this, Mr. Strika: Were you doing anything on the morning of that second day that you would not—let me rephrase that. Was there any work that you would normally have done on that second morning which you didn't do because you had fainted the day before? [19]

A. After I fainted, they gave me a lighter job on the boat. That morning probably I fix the nets and sit down and look for fish, that's all.

Q. Did they give you lighter work to do after you fainted the first time?

A. That's right.

Q. When did they give you that work?

A. Right after I fainted.

Q. The same day?

A. The next day. The next time we have to work.

Q. Describe the difference between the work you originally did and the light work that they switched you to.

A. I was throwing hook. After, they give me to throw the hook, and the guy catch it and put it on the sling. It was easier work, lots easier work than before.

(Testimony of Nikola Strika.)

Q. Did this switch-over from the heavier work to the lighter work take place before you fainted for the second time?

A. After I fainted, third time.

Q. You are going too fast, Mr. Strika. What I am asking you about is what happened to you after you fainted one time, the next day what happened to you, after you fainted only one time?

A. Same thing next day. After second time faint they give me lighter job.

Q. Well, if they gave you the lighter job after the [20] third time, does that mean that you are saying that they gave you—that you kept on doing the heavier work after the first time?

A. I was doing same work first time to the second time. After second time they gave me throw the hook, lighter work.

Q. Okay. Now I want to call your attention to the afternoon when you fainted for the second time. Tell the court what happened then when you fainted for the second time?

A. When I come back to normal, I went to sleep in the bunk, laid down and rest in the bunk.

Q. What were you doing the exact time that you fainted for the second time?

A. Was working around the deck, fixing the nets and throw the fish in hatch and throw the fish in brine, and things like that.

Q. While you were doing that job, just at the exact time that you fainted, was anybody working with you, or were you working alone?

(Testimony of Nikola Strika.)

A. Everybody was around, cook was working with me.

Q. Who saw you faint?

A. I believe everybody except skipper. Skipper was up in the pilot. Most of the time he was with you, sometimes he was up in pilot. He was down, too, but I am not sure. The rest of the crew saw me.

Q. What happened after you fainted for the second [21] time for the rest of that day?

A. Take it easy. Went to the bunk and lay in the bunk, and I took it easy.

Q. Did the captain of the ship know that you were taking it easy for the rest of the day?

A. Yes, he know.

Q. Did everybody on the ship know?

A. Yes, everybody know.

Q. What happened when you got up the next day?

A. When we got up, we start traveling and we look for the fish.

Q. Now, let me ask you a question right there. When you got up on the third day, having fainted the day before and the day before that, did you do anything different that day?

A. After second time I faint they gave me a lighter job, I told you that already, I was doing easier job after that.

Q. What were you doing when you fainted for the third time?

A. Working on the same job. Catch the fish, you throw the fish in the hatch, you throw the porpoises, you pull the nets, and things like that.

(Testimony of Nikola Strika.)

Q. When you fainted for the third time were you working alone or were you working with anybody else?

A. With a group, with a crew.

Q. Do you know if anybody saw you faint for the third time? [22]

A. I believe everybody saw me.

Q. What did you do after you came to on that third faint?

A. Went to the bunk and laid down, take it easy.

Q. What time of day was it when you fainted for the third time?

A. In the afternoon, 1:00 o'clock, I am not sure.

Q. After you fainted for the third time and you took it easy for the rest of that day, then what happened after that?

A. I had it easy for the rest of the trip.

Q. How long were you still out to sea after that third faint?

Mr. Karmelich: Just a minute, counsel, I wonder if the reporter could read back the last answer. I didn't hear it.

The Court: Yes.

(The record was read by the reporter.)

The Witness: We came home, I believe, 12th or 13th of January 1960, so we must have stay at least a couple or three weeks, probably three weeks.

The Court: Excuse me just a minute.

Read the last answer, please.

(The answer was read by the reporter.)

Q. (By Mr. Finkel): I would like, Mr. Strika, for you to tell the court as clearly as you can just

(Testimony of Nikola Strika.)

exactly what you did and what happened to you during that period of time after your third faint until the ship came to port, just exactly what did [23] you do. A. I was doing—

Q. In other worrds, a period of time went by after the third time you fainted until the time you came to port, and you estimate that time as being something like two or three weeks, is that correct?

A. Yes.

Q. Did you faint any more after that?

A. No, no, no, I didn't faint any more. I feel kind of weak and dizzy a little bit. We didn't do hard work after that. Make a couple of sets, and we was at anchor and we came home. We didn't even bring a full load.

Q. Did you do any work, did you do any heavy work during the next two or three weeks?

A. No, I didn't do no heavy work.

Q. But you did do light work?

A. Yes, something fixing around the boat.

Q. Describe as carefully as you can the type of things that you did during that next period of time. What kind of work did you do?

A. Most of the time we set, and when we don't set we probably looking for the fish. I hardly do nothing, sit and look for the fish. If you find the fish, you set and then you work.

Mr. Karmelich: May I have the answer, please?
[24]

(The answer was read by the reporter.)

The Witness: That's right.

(Testimony of Nikola Strika.)

Q. (By Mr. Finkel): When you describe that, are you describing what you did or what all the men on the boat were doing?

A. All the men. You all work together when you work.

Q. What I want to know is did you do anything different during that next two or three weeks than you would have done had you not fainted?

A. Yes, I was doing different. I just was throwing hook. That was different than I do before. Before, I was piling cork, I was piling lead line before, and now they give me throw the hook. I was doing different.

Mr. Finkel: I would like very much to get that answer.

(The answer was read by the reporter.)

Q. (By Mr. Finkel): What do you mean when you say, "Now they give me"? Who gave you? Who told you to change the work from the heavy work to the light work? A. Skipper.

Q. Do you remember when he told you to switch?

A. Yes, he did tell me.

Q. When did he tell you?

A. After all that. After second faint.

Q. Did you do any light work before these fainting spells? [25]

A. Sometimes light, sometimes hard, sometimes easier, like always on a boat. You don't work hard all the time. Sometimes hard, sometimes easy.

Q. Did anyone do any of your work for you before you fainted?

(Testimony of Nikola Strika.)

A. No, not before. I was doing my work all the time.

Q. Had you ever fainted before that, Mr. Strika?

A. No. Never was sick in my life. Never fainted.

Q. Never anything wrong with you in your life?

A. Never was sick in my life.

Q. Did you ever feel any different than you felt when you were a young man or any time in the past?

A. You cannot feel when you were young. You begin to feel different, that is true. But I was good to do my work, to do my job.

Q. In what ways did you feel different, if in any way at all?

A. Feel kind of a little bit slow down a little bit, things like that, that is coming, that gets you, you are little different.

Q. When you got back into port at the end of the second trip on the LIBERATOR—by the way, do you remember when that was?

A. Must have been 12th or 13th of January the last trip, the second trip. [26]

Q. When you got back into port, what happened then?

A. Went to unload the fish the next day, first or second day we unload the fish.

Q. Did you participate in the unloading job?

A. I unload the fish, yes.

Q. Did you do any different work while you were unloading than you did when you were unloading when you came back from the first trip?

(Testimony of Nikola Strika.)

A. Same work as I do before. Catch the fish and put it in the bucket.

Q. All right. Now, during this period of time starting when you fainted those three times, up until the time that the ship came in the harbor, into port and unloaded, how did you feel during that time?

A. I was feeling weak, on the weaker side, dizzy sometimes, dizzy and weak, slow motion.

Mr. Finkel: May I have the answer, please?

(The answer was read by the reporter.)

Q. (By Mr. Finkel): Did you tell anybody how you felt during that time? Did you tell any of the men on the boat how you felt?

A. I think I was telling a couple of guys that I feel on the weak side after that, yes.

The Court: What was the last answer?

(The answer was read by the reporter.) [27]

Q. (By Mr. Finkel): When you got back into port and you finished your unloading work, what did you do then? A. I went to marine doctor.

The Court: You went where?

(The answer was read by the reporter.)

Q. (By Mr. Finwel): How did it come to pass that you went to the marine doctor?

A. I get the card from the skipper's broker to go to the marine doctor.

Q. How did it come to pass that you got the card from the broker?

A. I went to the broker and I told him to take physical examination at marine doctor, so I got slip and I went to the doctor for physical examination.

(Testimony of Nikola Strika.)

Q. When you got into the harbor, when did you decide to go to a doctor?

A. I went after second day, I believe. I was trying to go out fishing, more fishing, I was trying to go out fishing, I feel pretty fair yet. Skipper told me, "I cannot have you on the boat because you are sick. You better go see doctor."

Q. When did that take place?

A. When we unload the fish and everything was done, after that.

Q. Had you ever discussed sickness and inability to work as a fisherman with anybody else on the ship before that happened? [28]

A. Not before, no.

Q. When you went to the doctor, who did you see, or where did you go?

A. Dr. West, I believe, at that time was in marine hospital, Dr. West, something like that.

Q. Does the name Dr. Wyatt sound familiar?

A. Dr. Wyatt, W-y-a-t, something like that.

Mr. Finkel: For the record, I think the Public Health Service records will indicate that that is Dr. Wyatt, W-y-a-t-t.

The Witness: That's right.

Q. (By Mr. Finkel): Have you done any work since then?

A. No. When I was by the doctor, I was to the doctor all February, to 29 February 1960, doctor sent me to marine hospital in San Francisco. I was there for five weeks in the hospital.

Q. How long?

A. Five weeks. Eight doctors examine me every

(Testimony of Nikola Strika.)

little thing, and they took a picture of my head, and that's the time they find my sickness, that is the first time I had for Parkinson's Disease.

Q. When you were dismissed from the San Francisco hospital, what happened after that?

A. They discharged me the 2nd of April and gave me a slip— [29]

Q. What year? Is this all in 1960 we are talking about?

A. Yes, sir, 1960. They discharge me from the hospital in San Francisco and gave me a card continue to San Pedro Clinic. Then I was going to San Pedro Clinic all the time to the 30th of September.

Q. 1960? A. 1960, yes.

Q. When you started working on the LIBERATOR in September of 1959, did you have any idea that you were sick?

A. I never knew, so help me God, cross my heart and hope to die right now, I never know. I was doing my work. Before that I fish 24 years, I had vacation one week, I was working steady for 24 years, very hard work, I feel perfectly all right.

Q. While you were on the LIBERATOR from September of 1959 to January 1960, did anyone ever accuse you of not doing your work?

A. No, nobody tell me anything about it. But after my fainting, after that time there was murmuring or complaining that I was unable to do my work, after my fainting. But before, no.

Mr. Finkel: No further questions. [30]

(Testimony of Nikola Strika.)

Cross-Examination

By Mr. Karmelich:

Q. Mr. Strika, you passed out three times on the U. S. LIBERATOR?

A. That is what Mr. Joe Dragich testified in the front.

Q. I am asking you. You passed out three times, fainted three times on the LIBERATOR on the second trip, isn't that right?

A. I going to say this: When man is fainted, he is unable to do anything for himself. Crew testified that I fainted three times and fourth time they take me to the sleeping quarters. That is what they testified.

The Court: Read the answer.

(The answer was read by the reporter.)

Q. (By Mr. Karmelich): Now, I am asking you, Mr. Strika, how many times did you faint?

A. Three times, the way they said. I told you again when a man fainted he can't do nothing for himself. Is that true. So Joe Dragich said that and whole crew.

Q. Mr. Strika, when you reported to the Public Health, did you tell them you fainted three times?

A. First I went to—

Q. Just say yes or no, Mr. Strika. When you went to the Public Health— [31] A. Yes.

Q. —did you tell them you fainted three times?

A. First time I don't tell them nothing. Second time I told them.

Q. What did you tell them the second time?

A. Told them because I was sick.

(Testimony of Nikola Strika.)

Q. What did you tell them?

A. That I fainted.

Q. How many times?

A. Three times the crew testified.

Q. What?

A. The crew testified three times, three or four.

Q. Did you tell them you fainted three times?

A. I think so. I am not sure.

Q. Mr. Strika, the boat came in from that trip that you fainted three times on, as you state, on January 13, 1960, isn't that right?

A. It must have been, something like that.

Q. When the boat came home to San Pedro, did you tell the skipper you weren't feeling well, Mr. Dragich?

A. I was trying to go fishing, go fishing with him.

Q. Mr. Strika—

A. He knew that I was feeling bad.

Q. Did you tell him that you were not feeling good?

A. Naturally, I told him that when I was fainting.

[33]

Q. When the boat came to San Pedro did you tell Mr. Dragich, "I am not feeling good"?

A. I didn't tell him first time nothing—

Q. When was the first time after the boat came home that you told Mr. Dragich you weren't feeling well?

A. We unload the fish 15th of January, and I still try to go out fishing with him, I was pretending I am able to go fishing. Joe Dragich told me like this, "Nick, I can't have you on the boat. You are sick. You go see doctor."

(Testimony of Nikola Strika.)

Q. Mr. Strika, after you arrived in San Pedro from the second trip, did you at any time tell Mr. Dragich that you were not feeling well?

A. He knew that.

Q. I am asking you, did you tell him?

A. I didn't tell him nothing at that time.

Q. Did you ask him for a Public Health certificate to go to see the doctor?

A. He told me, he said to go see a doctor. He said, "You are sick, you can't be on the boat, you go see a doctor." He told me three, four times. He told me like this.

Q. Isn't it true, Mr. Strika, that Mr. Dragich on January 18th told you that you were fired?

A. He told me like this: "I am not firing you. I can't have you on the boat because you can't do the work, you are a sick man, go see the doctor," he told me three, four [33] times, he told me like this.

Mr. Karmelich: May I have that answer, your Honor?

The Witness: I will repeat slowly.

He call me Nick. "Nick, I can't have you on the boat because you can't do work, you are a sick man, go see doctor." He told me three, four times, he told me plain like this.

The Court: Do you want the answer read?

Mr. Karmelich: That is all right, your Honor. I will ask him further.

Q. Mr. Strika, you stated that you were never sick before, isn't that right?

A. That's true.

Q. Never sick?

(Testimony of Nikola Strika.)

A. I had a couple of colds all my life. That is all that I know.

Q. Before seeing the Public Health doctors in January of 1961, when was the last time you saw any doctor, before January 1961—1960, I mean. I am sorry.

A. What I can remember, I went to doctor for check-up, general physical examination, I went '57, '58 and '59.

Q. Where? A. San Pedro Clinic.

Q. That's all? [34]

A. That is what I remember, I went for general check-up physical examination, and they always told me I am okay. They check urine, lungs, heart, my blood pressure, everything. They always told me I am okay. So I was working fishing all the time.

Q. And you didn't see any other doctors, just the Public Health doctors?

A. Yes, I see Fitzgibbons in Long Beach. That was in February, I believe.

Q. February when?

A. I don't remember the date.

Q. What year? A. '60.

Q. What? A. 60, I believe.

Q. Was this after you quit the U. S. LIBERATOR? A. That's right.

Q. After you quit the LIBERATOR?

A. After that, yes.

Q. Did you ever tell the Public Health doctors that you had suffered a stroke some time before?

A. I never had a stroke in my life. That is a pure

(Testimony of Nikola Strika.)

lie whoever said that. I have been fishing for 24 years, never stop.

Q. So you have never—when was the first time that [35] you knew you had the Parkinson's Disease?

A. When in San Francisco Hospital they took a picture of my head and I knew, they told me so.

Q. Didn't Dr. Fitzgibbons tell you that you had Parkinson's Disease?

A. He told me—he didn't call it that. He told me in different words. He said something in my head, he told me different way, he didn't say Parkinson's Disease. I didn't hear Parkinson's Disease.

Q. After the time you first reported to the U. S. Public Health Service Hospital in San Pedro, did you complain to the doctors about anything, did you tell the doctors what was wrong with you?

A. First time I went I told them I would like to go fishing back again on that boat. Second time when I went they find my blood pressure and something different.

Q. When did you first go to the Public Health?

A. I think January first time.

Q. 18th of January 1960? A. '60.

Q. At that time did you tell the doctors what you were complaining of?

A. I still want to go fishing, I told them nothing. They gave me a card, "Fit for Duty," that first time.

Q. On January 18th? [36]

A. Then I went to Joe Dragich and showed him my card. When I see Joe Dragich, I told him I am okay, I want to go fishing. He told me this way,

(Testimony of Nikola Strika.)

"Nikola, you are a sick man, you better go see doctor. You cannot fish, you are a sick man." Then I went second time back, so they find blood pressure and something sick in the head wrong.

Mr. Finkel: I wonder if I could have the last question and answer read.

(The last question and answer thereto were read by the reporter.)

The Witness: All right.

Q. (By Mr. Karmelich): When did you next see the doctor?

A. Then 29th of February I went to doctor at Marina and he sent me to San Francisco doctor.

Q. When did you see the San Pedro doctor next?

A. 30th of December.

Q. I mean after January 18th.

A. After a couple of days, I believe. The first time it was the 18th, and second time it was a couple of days after, I believe, something like that.

Q. During the first trip what work did you do? Were you on the net pile—

A. I was piling cork first trip.

Q. You were the cork man? [37]

A. Cork piling. Sometimes pull—

Q. Did you do that the whole trip?

A. I believe I did the first trip. One guy relieved me one time for a while. I was doing mostly cork piling, and I was pulling nets some time. Sometimes on the lead line, too.

Q. Mr. Strika, isn't it true that every trip there is

(Testimony of Nikola Strika.)

one man on the lead line, there is one man on the cork line, and then there are other men on the net?

A. Four men on nets, yes.

Q. Now, during that first trip were you on the cork line all the time?

A. I think so. Sometimes—when they are short, sometimes you pile lead line, when the men go after fish, after porpoises, then you jump over there. Something like that goes in the fishing business.

Mr. Finkel: Did you get that?

(The answer was read by the reporter.)

The Witness: Correct.

The Court: We will take a short recess.

(Recess taken.)

Q. (By Mr. Karmelich): Mr. Strika, on January 18, 1960, when you saw the Public Health, is it correct that the Public Health said that you were fit for duty, that you could go fishing?

A. They give me card, yes. [38]

Q. They gave you a card? A. First time.

Q. January 18th? A. 18th, yes.

Q. 1960? A. Yes.

Q. You went to the Public Health after Mr. Dragich told you that he wasn't going to take you fishing any more, isn't that right?

A. No. Joe Dragich talk to treasurer-secretary of the union Local 33, told him to send me back again to the doctor, so John Royal called me to tell me to go back to the doctor.

Q. It was after— A. After the 18th.

(Testimony of Nikola Strika.)

Q. It was after that conversation that you went to see the doctor for the first time?

A. It was before, before. Before. Joe Dragich called John Royal to tell him to send me.

Q. When did Mr. Dragich tell you that he wasn't going to take you fishing?

A. Tell me the 18th, I believe, or before, 17th, 16th or 17th.

Q. And you went to the doctor in the 18th?

A. Yes. [39]

Q. On the 18th the doctor said you were okay to go fishing?

A. Yes, he gave me okay to go fishing.

Mr. Karmelich: That is all, your Honor.

Redirect Examination

By Mr. Finkel:

Q. Mr. Strika, when you went to the Public Health Service office the first time after getting back to port, January 18th, had you had the conversation that you just mentioned with Mr. Dragich before that visit or after that visit?

A. After I was by the doctor and he give me that card, and then I went to see Joe next morning and I show to him card, I said, "Joe, here is what doctor said."

He said, "Nick, you are sick man, I can't have you on the boat, you better go see doctor again."

That is what he told me.

Q. What I want to get at, Mr. Strika, is the time sequence. The boat gets back to the harbor something

(Testimony of Nikola Strika.)

like January 13, 1960, right?—at the end of the second trip?

A. January 15 we unload the fish.

Q. After the fish unloading process was over, what is the next thing you did?

A. Joe told me, “I can’t have you on the boat,” that I [40] can’t do my work because I am a sick man.

Q. When was that?

A. After we unload the fish.

Q. Do you remember the date?

A. It must have been 16th or 17th. So I told him, “Joe, I want to go fishing with you, I feel all right, I want to go fishing.”

He said, “You can’t go fishing with me, you are a sick man, you better go see a doctor.” He told me a dozen times.

Q. When that happened, had you been to the doctor yet? A. No. After I went.

Q. After this conversation you went to the doctor for the first time, is that what you are saying?

A. The first time, yes, that’s right.

Q. When you went to the doctor for that first time, what did you tell them when the doctor examined you?

A. I said, “Doctor, I want to take general examination.”

He said, “Come on in, take off your coat, lay down on bed.”

Q. Did he ask you why you wanted an examination? A. No, he didn’t ask me.

(Testimony of Nikola Strika.)

Q. Did you tell him?

A. Every year almost I take a general examination.

Q. Why did you want a general examination at that par- [41] ticular time, do you remember?

A. What?

Q. When you went to that doctor—

A. I wanted to prove that I am all right to Joe Dragich. He told me that I am sick, I can't do no work, I am a sick man, go to the doctor.

Q. Was it your hope and intention to get a "Fit for Duty" slip? A. Yes.

Q. And then if you had gotten a "Fit for Duty" slip, what was it your intention do do with it?

A. I went back to Joe and showed him slip. He said, "Nick, you are sick. You better go see a doctor."

I said, "Here is slip Fit for Duty."

He said, "I don't believe it. You better go see another doctor. I don't believe that."

Mr. Finkel: No further questions.

Mr. Karmelich: No further questions.

The Court: You may step down.

Mr. Karmelich: Your Honor, there are parts of the records from the Public Health and there are further records that will be brought to this court, but, counsel, I think we have stipulated and I think it is in the pre-trial order that they may be introduced in evidence. Do you want to introduce them? [42]

Mr. Finkel: If I may note, your Honor, when I subpoenaed the records originally, the records which were forwarded to the Federal Building here were only

those records which commenced on the 18th of January 1960 to date. They did not send the records prior thereto. Yesterday I called the Public Health Office in San Pedro and I arranged to have his prior history sent up, and I understand though it may well be in the building now, it isn't ready to be sent down here, but it will be very shortly. Therefore, the Public Health records that are here are incomplete, and it was the pre-trial stipulation of counsel, approved by the court, that these documents would be offered as evidence for your Honor's examination. Accordingly, the medical picture in its complete stage is not yet available for your Honor, but it will be shortly.

Mr. Karmelich: Your Honor, I see no problem with introducing that portion. True, there are further records that will come in. It will be whatever Public Health records, if any, they have, of this man prior to January—

Mr. Finkel: Lest there be any confusion, it is clearly my intention offering what we have in evidence.

The Clerk: Your Honor, when the girl brought them down she said this was the record insofar as the first subpoena was concerned. There was a second subpoena and she would have the record prepared within an hour. That has been about an hour ago, so probably they will be ready this [43] morning some time.

The Court: Don't you think you should get hold of the girl and see whether the complete record is now ready?

Incidentally, will that include this or supplement this? Will that be a partial duplication?

Mr. Finkel: No. There will be no duplication, your Honor. That is my understanding.

The Court: Then you might as well offer that, and then see if you can get hold of the girl and offer the rest of it.

The Clerk: Which party is offering it. Mr. Finkel?

Mr. Finkel: The documents which I would now offer into evidence, your Honor, would be those Public Health medical reports which covered the time period of January 1960 through the present.

The Court: January 19th?

Mr. Finkel: January 18, 1960, through—

The Court: The present?

Mr. Finkel: Yes, sir, through the present. At this time I would offer these documents into evidence.

The Court: Very well.

Mr. Karmelich: No objection.

The Court: They will be received.

The Clerk: Libelant's Exhibit 1. [44]

(The exhibit referred to was received in evidence and marked as Libelant's Exhibit No. 1.)

The Court: As I understand it, you are also going to offer another portion of the records for the period prior to this?

Mr. Finkel: Yes. With the court's permission, I would offer those documents in evidence at some future time.

The Court: Are you ready to rest now?

Mr. Finkel: There is one further item that I would like to offer into evidence, if I may.

I would like to ask the court's indulgence for a moment, if I may, because I have a problem with respect

to this next item of evidence. I am referring now to a series of documents which are commonly referred to as Settlement Sheets. These sheets reflect the breakdown of the catch of the vessel involved in this case from the time period of approximately late 1959 through June of 1960, which covers the time period that we are concerned with in this case for the purposes of wages, and in that area. However, the copies that I have, although they are duplicate originals and are not bothersome in the terms of the best evidence rule—

Mr. Karmelich: Counsel, I will stipulate—I checked your records and for the record may I read this? These are identical to what you have. Your Honor, we don't even have to introduce it into evidence, because what counsel [45] is pointing to is that if this man is entitled to wages, he would be entitled to the amount of wages as evidenced by these records, fish catch records.

The Court: Why don't you both look at them and then stipulate that if he is entitled to wages at all, he is entitled to such-and-such a sum, and just state the sum?

We will take another recess and you can work that out, and at the same time get in touch with the Public Health Service upstairs and see whether or not they have the rest of that record.

Mr. Finkel: Fine, your Honor.

The Court: If they have, you can get that in and get rid of that.

(Recess taken.)

Mr. Karmelich: Your Honor, during the recess we were able to obtain the balance of the Public Health records which are from May 1948 to November '59 of the U. S. Public Health, and by stipulation they may be introduced as part of Libelant's 1.

The Court: Very well.

(The exhibit referred to was received in evidence as part of Libelant's Exhibit No. 1.)

Mr. Karmelich: The further stipulation, your Honor, that if this man is entitled to wages to the balance of the season, that the wage figure is in the amount of \$3,831.71. [46]

Mr. Finkel: That will be a net figure, your Honor.

The Court: Very well. How about a date?

Mr. Karmelich: I know your Honor's calendar is very congested, and as stated, your Honor, within three weeks this vessel will arrive. Did your Honor want us to notify you as to the exact dates so that if you have any spare time that any case may be settled and these men are here, we will bring them up forthwith, and I will take it upon myself to speak with your clerk every second day to ascertain whether or not there have been any cases settled, and whether or not this matter could be fit in.

The Court: You think it will be back within about three weeks?

Mr. Karmelich: Within three weeks, your Honor. Probably earlier, but we will definitely complete this matter within the next three weeks.

Your Honor has been very courteous and kind, and I sincerely appreciate it, and I will check every other

day with your clerk to ascertain available dates as soon as I know the exact date that my people will arrive.

The Court: You don't have to check every other day from now on.

Mr. Karmelich: No. As soon as I have a tentative arrival date of the vessel.

The Court: You might check with him Thursday, the [47] 2nd of March. Of course, that is a little early, I realize, but check with him for the first time Thursday, the 2nd of March, and see whether or not you might be available for Tuesday, the 7th. Then you can check regularly from then on, if not available Tuesday, the 7th. I think that I will probably have time on the 7th.

How long do you think it will take now? Half a day?

Mr. Karmelich: Your Honor, my case certainly will not take more than half a day. It will be very brief.

Mr. Finkel: My case will be briefer than that.

The Court: You won't have very much?

Mr. Finkel: Very little, if anything.

The Court: It may be that we can fit it in on a Monday afternoon.

Mr. Karmelich: Your Honor has been kind to us. We will fit it in any time for your convenience.

The Court: We will try that. You are calling on the 2nd?

Mr. Karmelich: Yes.

The Court: I have been having some trouble with the 7th. I have had a couple of cases blow up on the 7th so I have been trying to set additional cases. We will see on the 2nd. If not, we will fit it in some

time during the month of March, possibly on a Monday afternoon.

On the 21st I had a case that was supposed to go for [48] two weeks. Of course, those cases are very bad. If a case like that blows up, then I have a lot of time. So we will just leave it that way.

(Whereupon, at 12:00 o'clock noon the matter was continued to a date to be fixed by the court, which date was later fixed as February 23, 1961, at 9:45 o'clock, a.m.) [49]

* * * * *

Los Angeles, California, Thursday, February 23, 1961, 9:45 A.M.

The Court: The clerk will call the calendar.

The Clerk: No. 907-60 WB Admiralty, Nikola Strika vs. Joe Dragich, et al., for further trial.

Mr. Karmelich: Ready for respondent.

Mr. Finkel: Ready for plaintiff, your Honor.

The Court: You may proceed.

We will interrupt the trial, Mr. Herrmann, when they come in on the other matter.

Mr. Finkel: May it please the court, on Tuesday the libelant testified and was cross-examined, and it is the intention of the libelant now to move forward with his next witness, but I would make one request of the court before I do so, and that is that I would request that I be permitted to recall the libelant for the purpose of posing one or two further questions to him.

It occurred to me that might be particularly appropriate this morning in light of the fact that there is going to be a short interruption anyway, rather than interrupt a new witness.

The Court: Very well. You may call him.

This witness has been sworn. [51]

NIKOLA STRIKA

recalled as a witness in his own behalf, having been previously duly sworn, was examined and testified further as follows:

Further Direct Examination

By Mr. Finkel:

Q. Mr. Strika, I would like to call your attention to the first of the two trips that you took on the LIBERATOR, which first trip lasted from late September 1959 until approximately late October 1959, and I would like to ask you, sir, how many different types of work you did aboard that ship during the first trip?

A. First trip I was piling cork whole trip.

Q. Did you do any other work besides piling cork on the first trip?

A. Yes, you do. On a set, you pull in porpoises and throw overboard, you take tuna from the nets and throw in brine, and things like that.

Q. Did you do any other work on the first trip?

A. Sometimes on the set I used to go to the lead line and sometimes I pull the nets, too.

Q. Lead line?

A. Yes, for a short time.

(Testimony of Nikola Strika.)

Q. Did you ever do any work on the book during the first trip?

A. Not on the first trip, no. [52]

Q. At any time during the first trip were you transferred from heavy duty to light duty?

A. Not first trip, no.

Q. At any time during the first trip did anyone complain to you that your work was too slow?

A. Nobody told me nothing.

Q. At any time during your voyage, either of your two trips, did you ever feel any physical changes taking place?

A. I feel a little bit like this, slow down, you know how it is.

Q. When did you feel that?

A. I feel the worst the second trip.

Q. Tell the court as much as you remember about that.

A. I feel a little bit on the slow side, a little bit.

Q. After your fainting spells that you testified about on Tuesday, on the second trip did the nature of your work change?

A. Yes, I was working on the hook after that.

Q. Was that the first time that you were working on the hook on the LIBERATOR?

A. Yes, second trip.

Q. Will you tell the court just exactly what events took place with respect to your switching over to working on the hook?

A. I was working first on the cork and then—
[53]

(Testimony of Nikola Strika.)

Q. Speak very slowly and distinctly.

A. Before I working on the cork line, then after I work on the lead line for some time, and then after I fainted they give me throwing hook, lighter job.

Q. When did they give you the job of throwing the hook?

A. After my fainting.

Q. You had never done work on the hook before on the LIBERATOR?

A. Never, never before.

Mr. Finkel: Your witness, counsel.

Recross-Examination

By Mr. Karmelich:

Q. Mr. Strika, you stated you felt worse on the second trip. You didn't feel good on the first trip, either, did you?

A. I felt pretty good. I was doing my work.

Q. You say you felt pretty good?

A. I feel all right.

Q. What was wrong with you?

A. There was nothing wrong, I guess.

Q. You said you felt worse on the second trip. Now, what was wrong with you physically on the first trip?

A. There was nothing wrong, I don't think so. Just I feel a little slow.

Q. You felt a little slow? [54]

A. Yes.

Q. What made you feel a little slow?

A. I don't know.

(Testimony of Nikola Strika.)

Q. Had you felt this slow feeling before you got on the job on the LIBERATOR?

A. No, no.

Q. On the first trip did you have trouble lighting a cigarette? A. No. It was easy.

Q. You could light a cigarette with no trouble?

A. Certainly.

Q. The second trip?

A. Second trip same thing. Just a little bit, sometimes—

Q. No trouble at all?

A. No. It was easy.

Q. On the first trip you state that you were the cork man all the time?

A. Whole trip that trip, first trip I was piling cork.

Q. And the second trip you were cork man, lead man— A. Yes.

Q. —and then on to the hook?

A. That's right.

Q. The hook is the line leading from the boom—

A. Down. [55]

Q. —that you hook onto an eye to raise the net out of the water?

A. Yes, and throw the hook to somebody else.

Q. That hook is used with a line just to raise the net?

A. To pull the net up, yes.

Q. Who was on the lead line on the first trip?

A. I believe engineer, chief engineer.

Q. Who was on the lead line on the second trip when you didn't handle the lead line?

(Testimony of Nikola Strika.)

A. Engineer, chief engineer.

Q. Did the cook ever go on the lead line?

A. Sometimes, yes.

Q. Why would you go on the lead line?

A. They send me on the lead line.

Q. Did they send you on the net pile?

A. Yes. Some other guy took the cork line and he said, "You go pile the lead line," and then I go work there.

Q. Why did they do that, Mr. Strika?

Mr. Finkel: Objection, your Honor. It calls for a conclusion of the witness.

The Court: Sustained.

Q. (By Mr. Karmelich): Mr. Strika, you are familiar with the fact, are you not, that approximately eight crew members of the U. S. LIBERATOR who fished on the first or second trip signed a document stating that they wanted you fired, or some- [56] thing to that effect, because you couldn't do your work?

A. I didn't know nothing about it, but I heard about it later, I heard about it.

Q. Didn't you see that document when you came down to the boat—

A. Nobody showed it to me.

Q. —with your union representative, Mr. Royal?

A. I didn't see it.

Q. Were you there when Mr. Dragich, the skipper and part owner of the boat, talked to Mr. Royal?

A. No. Mr. Royal told me that they signed some

(Testimony of Nikola Strika.)

letter on the boat, but he didn't see it. That's all I know about it.

Q. Mr. Strika, on or about January 18 you went to the Public Health doctors in San Pedro, California?

A. Yes.

Q. And you went there for one purpose—to prove to Mr. Dragich that you could handle your job?

A. Yesterday you asked me that question.

Q. I am asking you again.

A. I already answered that question.

The Court: Answer the question.

The Witness: Okay.

The Court: Read the question.

(Question read by the reporter.)

The Witness: That's right. [57]

Mr. Karmelich: That is all.

The Court: When did you first go to work on the LIBERATOR, the first trip?

The Witness: September some time.

The Court: September 1959?

The Witness: Yes.

The Court: When did you get back the first trip?

The Witness: 13th, 14th.

The Court: You came back when?

The Witness: I believe the 13th. I am not positive. 13th of January.

The Court: From the first trip?

The Witness: No. From the second trip.

The Court: When did you get back from the first trip?

The Witness: In October some time, late in October.

(Testimony of Nikola Strika.)

The Court: October some time?

The Witness: I think so. They know, they got it down.

The Court: Then you went out again when?

The Witness: November out and stood to the 13th of January 1960.

The Court: You went out in September and came back in October?

The Witness: Yes, first trip. [58]

The Court: Then when did you go out again?

The Witness: In November, I believe.

The Court: You went out in November and then you came back the 13th of January?

The Witness: Come back January 13, 1960.

The Court: All right.

Mr. Karmelich: That is all.

Mr. Finkel: Do you desire that I proceed with the next witness, your Honor?

I call to the stand Mr. Rudy Kuzmanich, please.

RUDOLF F. KUZMANICH,

called as a witness by and on behalf of the libelant, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated and give us your full name.

The Witness: My name is Rudolf F. Kuzmanich.

Direct Examination

By Mr. Finkel:

Q. Mr. Kuzmanich, I will call your attention to the period of time 1959 and 1960 because that's the

(Testimony of Rudolph F. Kuzmanich.)

period of time that we are concerned with in this case. I will ask you, sir, if you were ever employed aboard the ship U. S. LIBERATOR.

A. Yes, I was. [59]

Q. Will you tell the court when your employment aboard the LIBERATOR began?

A. To the best of my recollection, my employment aboard the LIBERATOR began approximately in August, if I am not mistaken, August or September.

Q. Of what year—'59?

A. '59, right.

Q. When did your employment on the LIBERATOR end?

A. My last trip aboard the LIBERATOR was at the end of March of '60, that was the last active trip I made. Although my official termination or departure from the boat I don't think was actually marked in time until two trips after that, because I was on a disabled status.

Q. Is it correct that March 1960 marked the end of your physical presence aboard the LIBERATOR?

A. That's right.

Q. During that period of time what was your job on the LIBERATOR?

A. My job was in the little skiff which is—I could use the expression “dinghy”—which is placed in the back of a large skiff, which is let into the water when you make a set, and when the boat comes around the fish to meet the big skiff, the little skiff goes out and you row your way around the boat—

Q. Excuse me for interrupting, but what I am try-

(Testimony of Rudolph F. Kuzmanich.)

ing to [60] ask you is, you were a member of the crew, were you not? A. Yes. I am sorry.

Q. As a member of the crew, were you actively engaged in the fishing process on the LIBERATOR during that period of time? A. Yes, I was.

Q. Do you remember the libelant in this case, Mr. Strika, being on that boat?

A. Would you repeat that?

Mr. Finkel: Mr. Strika, stand up, please.

(Mr. Strika stood up.)

Q. (By Mr. Finkel): Do you remember this gentleman being a member of the crew at that time?

A. Yes, I do.

Q. The questions that I am going to ask you, sir, are going to be primarily about that gentleman on the boat. A. Right.

Q. What I would like to ask you, sir, is whether or not you remember when Mr. Strika started working on the boat. Do you remember?

A. If I am not mistaken, Mr. Strika started working on the boat prior to our September trip. I believe it perhaps may have been a day or a couple of days, around there.

Q. If that is so, then that would mean you were on the ship before he was? [61]

A. Yes.

Q. And when he got on the ship, were you already there? A. Yes, I was.

Q. When Mr. Strika came on the ship, do you remember what work he did on board the ship?

A. Yes. Do you mean on our—

(Testimony of Rudolph F. Kuzmanich.)

Q. Was he a member of the crew?

A. Yes, he was, right.

Q. When you went on a fishing trip in late September 1959, will you tell the court what work you did on the LIBERATOR and what work Mr. Strika did on the LIBERATOR to the best of your recollection, if you do recollect.

A. The work I did, as I told you, was in the small skiff. And also helping on the net pile to bring back the net on board the ship after the set had been completed. As well as, if we did catch any fish, to put them into the hatch, to salt them, and everything else that goes along with the normal process of fishing.

Mr. Strika, as I recall, was actively engaged in working upon the cork pile, which is one of the hardest sections of the net to work. And he also engaged in all the rest of the activities on board the boat that involved any of the process of fishing.

Q. While you were on board the LIBERATOR, did you have occasion to see Mr. Strika doing his work on the cork line? [62]

A. Yes, I did.

Q. Do you recall, sir, that the ship LIBERATOR made a trip starting September '59 and it came back to port some time in October '59? Does that mesh with your recollection?

A. Those are the approximate dates, I imagine. What the exact dates are, I don't know. It was September and October.

Q. When the boat got back to port in October, how long did it stay in before it went out again, approximately?

(Testimony of Rudolph F. Kuzmanich.)

A. We stood in approximately a couple of weeks, I believe. This I am not sure of. I know we started the second trip in November, if I am not mistaken.

Q. Did you do any work while the ship was in port between those two trips?

A. Did we do any work on the boat?

Q. Yes, on the boat.

A. Yes. You have a lot of work that has to be done while you are in. You have to make sure that the boat is seaworthy before you go out again, and this involves a process of bringing aboard your stores, checking your water, putting on your fuel—

Q. Did you participate in the unloading?

A. Yes, I did.

Q. How long did the unloading process last, approximately? [63]

A. I am pretty sure that it lasted two days.

Q. Do you recall whether or not Mr. Strika participated in the unloading? A. Yes, he did.

Q. Can you tell the court what you did on the unloading job?

A. I worked on top of the deck when they lifted the buckets of fish out, hooking them up, and they swing them aboard a dock, they roll them off, as well as in the hatch itself, taking the fish and putting them—loading them into the buckets.

Q. Do you know at this moment, or shall I say do you recall at this moment what work Mr. Strika was doing in the unloading job? Yes or no do you?

A. Yes.

Q. Will you tell the court what that work was?

(Testimony of Rudolph F. Kuzmanich.)

A. Mr. Strika participated in unloading the ship by being down in the hatch, taking the fish out, putting them in the buckets; and I am pretty darn sure that he also at times was up on top of the deck, too, hiking the buckets up. This is a thing where everybody participates. You are down there and they need men up above. In the afternoon some men might go down and others come up. You know, if you get cold or something.

Q. Mr. Kuzmanich, when you shipped out the second time [64] in November, was Mr. Strika aboard with you? A. Yes, he was.

Q. When you shipped out the second time and you started the second trip, what work were you doing?

A. What work was I doing on the second trip?

Q. Yes. A. The same work.

Q. Do you remember what work Mr. Strika was doing when the second trip began? Yes or no.

A. Yes.

Q. Tell the court what this was.

A. It was initially the same work that he started out with on the first trip, working the corks.

Q. And do you know whether or not there came a time on the second trip when Mr. Strika's work was changed to another kind of work?

A. Yes, it definitely was.

Q. Will you tell the court about that, please?

A. We were fishing somewhere down off Acapulco.

Q. Do you remember about when that was, sir?

A. No, I cannot give you the exact date.

Q. For example, do you remember approximately

(Testimony of Rudolph F. Kuzmanich.)

how long after you left port on the second trip it was, or do you remember whether it was half way through the second trip, a third of the way? [65]

A. I would say approximately a third of the way.

Q. Will you continue with your narrative, please?

A. We were fishing somewhere off Acapulco and the temperature down there was roughly around 95 to 100 degrees when you were working in the daytime. Mr. Strika was overcome with heat prostration. We finished a set, and I know that I walked out on the deck and they have a hatch cover that you cover the hatch with, Mr. Strika was laying on top of this hatch cover and he looked like he was one step from death. He had no color. He was just glassy. He was really sick.

Mr. Karmelich: Your Honor, I move to strike that about him being sick. It is a conclusion of the man. He can testify what he saw.

The Court: The last words, "He was really sick," may go out.

Q. (By Mr. Finkel): Would you describe to the court just exactly what you saw happen to Mr. Strika or what you saw about Mr. Strika's appearance at that time? Just what you saw.

A. What I noticed in Mr. Strika or what I saw in him was the fact that it was evident that this man at that time could engage in no—

Q. No. Excuse me for interrupting you. All I want you to tell the court is what you saw. Just tell the court things you observed with your eyes.

A. I saw him laying in his bunk. He went to his

(Testimony of Rudolph F. Kuzmanich.)

bunk, [66] he couldn't get up from the bunk. He was—"ill" is the only word I can use.

Mr. Karmelich: I move to strike that he was ill, your Honor.

The Court: It may go out.

Q. (By Mr. Finkel): Do you recall when you saw him lying on the deck— A. Yes.

Q. —do you recall anything about Mr. Strika's face? Do you remember seeing anything peculiar about his face? A. An absence of color. Very white.

Q. Do you recall at any time on the second trip observing anything about Mr. Strika's face that was in the slightest manner unusual to you?

A. To me his face was the face of a man who was not physically well.

Mr. Karmelich: To which, your Honor, I will move to strike the answer.

The Court: It may go out.

You are not a doctor. Just tell us what happened. They have asked you a dozen times.

Q. (By Mr. Finkel): Just tell us what you saw.

The Court: If he was pale—

The Witness: He was. He was white. His face was fairly glassy. [67]

Q. (By Mr. Finkel): Did you notice anything on the second trip which struck you as unusual about Mr. Strika's physical movements?

A. They had slowed down considerably.

Q. Will you tell the court just exactly what you mean when you say they had slowed down considerably?

(Testimony of Rudolph F. Kuzmanich.)

A. It was very laborious. Observing him, it seemed it was very laborious for him to move. He had trouble getting around to such a degree that it was very noticeable.

Q. Do you recall when you noticed that for the first time?

A. This marked degree of noticeability took place after this period of heat prostration, after these incidents on board the boat when he was overcome by heat.

Q. I would like to take you back to the first trip for a moment.

With respect to the first trip, do you recall seeing, as the trip began, anything peculiar about the movements or the physical appearance of Mr. Strika?

A. What I recall is that I remembered him as a big man who moved slowly, who did not have the reactions of a quick, young man; a big man who was strong and big.

Q. Did you ever notice or observe Mr. Strika on the first trip not to do his work? A. No. [68]

Q. Did you ever on the first trip complain about Mr. Strika in any way?

A. The only way that I had ever complained about Mr. Strika, if I did on the first trip, was in a moment of anger when in a set—

Mr. Karmelich: To which I will object, your Honor. The question is did he ever complain. It can be answered yes or no.

The Court: Sustained.

Mr. Finkel: Just answer yes or no.

The Witness: Yes.

(Testimony of Rudolph F. Kuzmanich.)

Q. (By Mr. Finkel): Tell the court exactly what happened.

A. If there was a sling and you wanted it immediately, you might say, "Grab me that real quick," because you are trying to get the net, or you might have a gilled fish, or something like that, any little incident like that, and you can jump down, being a young man, and get it real quick.

Mr. Karmelich: Your Honor, there are conclusions here.

The Court: Move to strike it, then.

Mr. Karmelich: I move to strike it.

The Court: It may go out.

Testify to facts; not what might have happened, but what actually did happen is what we are interested in.
[69]

Q. (By Mr. Finkel): Let me ask you another question: When the first trip began and everybody just started doing a job, when the thing began did Mr. Strika do anything or fail to do anything which made you complain to anyone?

A. No, not in that sense.

Q. When the trip began and that work first began, did you notice anyone else to complain about Mr. Strika?

A. Did I notice anyone else to—

Q. As the first trip began.

Mr. Karmelich: Did you notice—

Mr. Finkel: I will rephrase my question.

Q. Did you hear anyone complain at that time?

A. Not as the first trip began.

Q. Did you hear anyone complain about Mr. Strika

(Testimony of Rudolph F. Kuzmanich.)

with respect to his work at any time during the first trip?

A. Yes, later in the first trip.

Q. What do you mean by later in the first trip?

A. When we had made some sets and after we had caught some fish, after we had been on the first trip for a while.

Q. Would you say when the trip was half over, two-thirds over, three-fourths over?

A. In that period, half to two-thirds.

Q. Do you recall at this moment what those complaints were that you heard?

A. Slowness of movement, basically. [70]

Q. Do you recall who made those complaints?

A. No, I can't pick names out. It is immaterial—not immaterial, but I can't remember.

Q. Isn't it true that the complaints you refer to were made by members of the crew?

A. Right, yes.

Q. At any time—I am still dealing with the first trip. At any time after you heard these complaints being made by somebody who was a member of the crew about Mr. Strika's slowness, was Mr. Strika's work assignment changed in any way during the first trip?

A. No, it was not.

Q. During the second trip did you hear any complaints made by anyone on the ship about Mr. Strika's work?

A. Yes.

Q. Will you tell the court about that, please?

A. During the second trip after we were into the second trip and we were working in the heat and Mr.

(Testimony of Rudolph F. Kuzmanich.)

Strika suffered these heat prostrations, it was evident that he could not do the work—

Q. All I am asking you is what complaints you heard. Don't make any evaluation. Tell us what you saw and heard.

A. We saw the heat prostrations, we saw that he could not do the work, he was not able to do the work.

Q. You say you heard people complain about Mr. Strika [71] and his work on the second trip?

A. Yes.

Q. Do you remember what any of them said?

A. One moment.

I cannot pick one single quotation—

Q. On the first trip you said you heard complaints that his work was slow? A. Yes.

Q. What type of complaints did you hear on the second trip?

A. That he could not take this, that this fishing and this heat was too much for him, that he was too ill.

Q. Did you hear any complaints on the second trip that Mr. Strika was too slow?

A. Yes. He was slower and slower.

Q. Did you, yourself, observe Mr. Strika to be slow in his work? A. Yes, yes, very much.

Q. Did you complaint about Mr. Strika's work being slow? A. Yes.

Q. Did you observe any development or change in this slowness of Mr. Strika's work during the second trip? A. It got markedly worse.

Q. What do you mean when you say it got markedly worse?

(Testimony of Rudolph F. Kuzmanich.)

A. It became—Mr. Strika could no longer handle—he [72] was placed on the lead lines, even working the lead line, which was an easier job than the corks, he could not keep up with. They put him on the hook, which was the simplest job on the boat, and this was even an effort for him.

Q. Was that the first time you ever saw Mr. Strika working on the hook? A. Yes.

Q. While Mr. Strika was being cross-examined a few moments ago, you heard counsel for the respondent refer to a letter, did you not? A. Yes, I did.

Q. Do you remember anything about that letter?

A. Yes.

Q. Were you a signatory to that letter?

A. Yes, I was.

Q. Will you tell the court everything that you remember about that letter?

A. I remember that I signed the letter, as well as I thought the other members of the crew who signed the letter were signing it because we realized that he was too sick to be able to fish—

Mr. Karmelich: To which, your Honor, I object. It is self-serving. The question is not what he realized.

The Court: Tell us what the letter said.

The Witness: The letter was a statement that the crew members wanted Strika off of the boat because he could not handle the job of fishing.

Q. (By Mr. Finkel): Now you say you were a signatory to that letter? A. Yes, I was.

Q. Why did you sign it?

A. Why did I sign it?

(Testimony of Rudolph F. Kuzmanich.)

Q. Yes. A. I signed it because I thought—

Mr. Karmelich: To which I will object as being self-serving.

The Court: Overruled. You may answer that.

Q. (By Mr. Finkel): Tell us exactly why you signed it.

A. I signed this letter because I thought I was doing him one of the greatest favors I could possibly do by getting him off the boat.

Q. What do you mean by that?

A. I thought if this man ever made a trip like the trip we were on it would kill him.

Q. This is the thought process you were going through when you signed the letter? A. Yes.

Q. What made you think all that?

A. Because I had witnessed Mr. Strika during this sequence of events when he was overcome with this heat, and I [74] thought to myself that this man could not survive another trip like this. It was that bad. It affected him that much.

Mr. Karmelich: Your Honor, I am going to object to the whole of his conclusions. He is not a doctor.

The Court: The objection is overruled. It isn't offered for the purpose of proving that he couldn't survive the trip. It is true he isn't a doctor and he can't testify to that, but he is testifying as to why he signed it. You asked about the letter and he is testifying as to why he signed it. If he wants to, he can testify that he signed it—if that is the reason—because he thought Mr. Strika would drop dead the next day, if

(Testimony of Rudolph F. Kuzmanich.)

that's his reason. It doesn't mean that he was going to drop dead or that he was going to be sick.

Q. (By Mr. Finkel): Do you remember when, with respect to the tenure of the second trip, that letter was presented to you by anybody?

A. It was presented to me when we were back in port.

Q. At the end of the second trip?

A. At the end of the second trip.

Q. Who presented it to you?

A. It was presented—it was in the galley, and there were crew members around, and I come into the galley and there was this letter, which we all signed.

Q. Did you discuss this letter with anyone? Just yes or no. [75]

A. Yes.

Q. Did you discuss this letter with the respondent Mr. Dragich?

A. Not to my recollection.

Q. Did you discuss this letter with anyone who is in this room at this time?

A. If I am not mistaken, I think there is a man there, Nick Mercovich, who was also present at that time.

Mr. Finkel: Will you stand up, sir?

(A man stood up.)

Mr. Finkel: Is this the gentleman you are referring to?

The Witness: Yes. And all of the crew had gathered around.

The Court: You may sit down.

(The man sat down.)

(Testimony of Rudolph F. Kuzmanich.)

Q. (By Mr. Finkel): Is it your testimony, sir, that you discussed that letter in some manner with this gentleman? A. As an informal thing.

Q. Do you remember what you said to him with respect to that letter?

Mr. Karmelich: To which I will object as being hearsay.

The Court: Sustained.

Mr. Finkel: Your Honor, I submit in light of the [76] fact this witness is present at this time and is going to testify in this case, that the primary objections as being hearsay evidence are not present, because this can be cross examined and tested, and it is significant to determine what the thinking of the signatory to this letter was, and this is the only way I can get to it.

The Court: Counsel, you are proposing a new rule on hearsay evidence. That is not the rule. The objection is sustained.

Q. (By Mr. Finkel): Was your reason or were your reasons for signing that letter that you told us about a moment ago predicated in any manner upon that conversation that you had with this gentleman?

Mr. Karmelich: Your Honor, I will still object.

The Court: The objection is sustained. You already asked him that question. That of course is a leading question. You already asked him what his reasons were. The objection is sustained. You asked him what his reasons were. He has given you his reasons. You can ask him if he had any other reasons, and he may testify.

Mr. Finkel: I will rephrase my question, your Honor.

(Testimony of Rudolph F. Kuzmanich.)

Q. Above and beyond the specific reasons you listed a moment ago for signing that letter, did you have any reasons for signing that letter which were connected with conversations [77] with other members of the crew?

Mr. Karmelich: To which I will object as being leading?

The Court: The objection is sustained. I told you, counsel, you had asked him the question.

Mr. Finkel: Yes, your Honor.

No further questions.

The Court: We will recess this case for a few moments. If you wish to leave, you may. We will be at recess for a few minutes.

You may step down.

(Recess taken.)

The Court: You may proceed.

Cross-Examination

By Mr. Karmelich:

Q. Mr. Kuzmanich, did Mr. Strika faint at all during the first trip, the one that started in September, October?

A. No, he did not.

Q. Then he fainted on the second trip?

A. Yes.

Q. How many times, to your knowledge?

A. To my knowledge, twice that I know of.

Q. When was the second time? You have related the first time. [78]

A. The second time was in the afternoon.

(Testimony of Rudolph F. Kuzmanich.)

Q. That same date?

A. It was either that same day or on the following day.

Q. Mr. Kuzmanich, you are now suing Mr. Dragich, are you not, the owners of the boat U. S. LIBERATOR? A. Yes, I am.

Q. On the first trip did you ever notice Mr. Strika try to light a cigarette?

A. I observed him lighting a cigarette, yes.

Q. Was there anything different from what an ordinary person—watching an ordinary person lighting a cigarette? A. It would be slower.

Q. Would he drool, saliva coming down the lower part of his mouth and onto his chin?

A. That I don't remember. I know that he was slower when he lit a cigarette.

Q. You noticed this throughout the first trip, isn't that correct? A. Yes.

Q. And his motions throughout were slow?

A. Yes.

Mr. Karmelich: That is all.

Your Honor, counsel has stipulated that the document referred to by this witness, wherein they requested that this man be relieved as a crew member, may be introduced into evi-[79]dence as respondent's first in line.

Mr. Finkel: So stipulated:

The Court: Whose exhibit?

Mr. Karmelich: Respondent's.

The Court: That is the same document that you referred to—

(Testimony of Rudolph F. Kuzmanich.)

Mr. Karmelich: That the crew members signed.

The Court: —that you referred to in cross-examining the libelant?

Mr. Karmelich: Yes, your Honor.

The Court: Very well. It will be received.

Mr. Finkel: May I ask one or two further questions?

The Court: Yes.

The Clerk: Respondent's Exhibit A.

The Court: It will be received as respondent's next in order.

(The exhibit referred to was received in evidence and marked as Respondent's Exhibit A.)

Redirect Examination

By Mr. Finkel:

Q. Sir, you just testified that you are suing the defendant, is that true? A. Yes, sir.

Q. Will you tell the court very briefly what kind of [80] thing is this?

Mr. Karmelich: Your Honor, it is immaterial as to what the nature of it is.

The Court: Objection sustained. Unless you want to show it is something not related to this ship.

Mr. Finkel: I am trying to show it was something early and unrelated to this matter.

The Court: The objection is sustained.

You may step down.

The Witness: Thank you.

Mr. Finkel: Libelant rests, your Honor.

Mr. Karmelich: Mr. Dragich, will you go over there and be sworn by the reporter?

When you talk, be sure to keep your voice up so that we may all hear you.

Mr. Dragich: I will try.

JOSEPH P. DRAGICH

called as a witness by and on behalf of respondents, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, sir, and give us your full name.

The Witness: My name is Joseph P. Dragich.

The Clerk: D-r-a-g-i-c-h?

The Witness: Yes. [81]

Direct Examination

By Mr. Karmelich:

Q. You are one of the respondents or one of the men being sued here? A. Right.

Q. You are a part owner of the U. S. LIBERATOR, is that correct? A. Right.

Q. During the latter part of 1959 and for at least 13, 14, 15, 16, 17 days of January, Mr. Strika was employed by you aboard the U. S. LIBERATOR?

A. He was.

Q. And you were the master of the U. S. LIBERATOR? A. Right.

Q. I show you a document which has been introduced into evidence as Respondent's Exhibit A and ask you whether you have ever seen that document.

A. I have.

(Testimony of Joseph P. Dragich.)

Q. Did you have it prepared?

A. No.

Q. Did you request someone to prepare it?

A. No.

Q. When was the first time that you were cognizant of the existence of this document?

A. When my crew demanded that I relieve Mr. Strika of [82] duties on board the second trip.

Q. Mr. Dragich, can you tell the court the circumstances leading up to your employment of Mr. Strika?

A. It is quite some time ago but I will do my best.

If my recollection is correct, we finished what we call local fishing, or the fish moved away.

Q. By "local fishing" you mean where you fished off the coast of California as distinguished from going down into foreign waters?

A. Right. Then there was one member of the crew of the former crew who got off. That evening I spoke to my wife and she said, "Why worry about it?"

Mr. Finkel: Objection, your Honor. That calls for hearsay testimony.

The Court: The objection is overruled.

Don't give us the conversation with your wife. You can say you spoke with your wife because that is not hearsay.

Q. (By Mr. Karmelich): Anyway, after talking to your wife what did you do?

(Testimony of Joseph P. Dragich.)

A. I says, "Fine." I understand he was a pretty good man, so I says—

Q. No, no. What did you do?

The Court: What did you do?

The Witness: I had the wife get in contact with his wife for him to come down and we would talk over whether he was [83] going to go with me or not.

Q. After you talked to him you hired him?

A. Right.

Q. How long did you know Mr. Strika prior to this time? A. I didn't get that.

Q. How long prior to your hiring Mr. Strika had you known him?

A. I would say probably five, six years.

Q. During that time—you heard Mr. Strika testify here in court—was his speech approximately the same during that time?

A. Well, I would say that there was very little change, if any. In fact, to the best of my ability I don't think I would be able to say that there was a change.

Q. And his movements?

A. His movements were always slow because he has been always a heavy man.

Q. Mr. Dragich, it has been testified here that the U. S. LIBERATOR left on a voyage some time in the latter part of September, early part of October, for a Mexican fishing voyage?

A. Well, in view of the fact that I have no records at the present time with me I will accept those dates as so.

(Testimony of Joseph P. Dragich.)

Q. Mr. Strika left with you on that trip?

A. Right. [84]

Q. During that time—let's say en route to the fishing grounds—did you observe the actions of Mr. Strika?

A. En route to the fishing grounds we only had three days of running, and that is hardly enough, because you take your watches and you need it during the day time, but outside of that, at night you just keep maintaining watches.

Q. Did you see him walk? A. Yes.

Q. How was that?

A. His usual walk; slow. He is sure-footed.

Q. Did you ever see him light a cigarette?

A. Oh, yes.

Q. Will you explain to the court just what you observed when Mr. Strika was attempting to light a cigarette?

A. Well, there is many a cigarette that he lit that he had to light a second match because of the shaking of his hand.

Q. Did you notice anything about his face?

A. Yes. Saliva coming out of the corners of his mouth.

Q. Did you notice this throughout the first trip?

A. At first I didn't pay too much attention to it until one of the crew members drew my attention to it.

Q. During the first trip did your crew members complain to you about the work that Mr. Strika was doing? Just yes or no. A. Yes, they did. [85]

(Testimony of Joseph P. Dragich.)

Q. To the best of your recollection, will you tell the court briefly what were the assigned or what was the assigned duty of Mr. Strika on the first trip?

A. Well, as a rule that is practically the skipper's responsibility and you try a man at various places. Of course, Mr. Strika was insistent upon taking care of the corks. But he could not stand up to the pace that the youngsters put up for him. So then we had to change him.

Q. When you say "we had to change him," was that during the first trip?

A. That was during the first trip.

Q. And—

A. He was on the web for a while, but he couldn't even hold that up. Then we changed him to the lead line. Then for a while in the first trip we couldn't do any more, we put him on the hook, taking care of the hook and the strap.

Mr. Finkel: May I have the answer read?

(The answer was read by the reporter.)

The Witness: Right.

Q. (By Mr. Karmelich): Will you explain to the court what you mean by the hook and the strap?

A. In the rigger's language, the hook—the way I am referring to it, it would be called the whip. A whip is a single cable going up to the top of the boom and down to the winch, and by means of this we pick up the net and drop it down again for the boys to pick it up.

Q. And the strap that you referred to?

A. The strap is around the entire net and picks up the net to the top of the boom and then drops it

(Testimony of Joseph P. Dragich.)

down again. We have a man stationed, when the net drops down all you have to do is unhook it because there is another strap already in place on the side of the rail, so all you do is swing this hook over to the man that is already waiting for it. Then pick up the strap and throw it up against the side.

I imagine, offhand I would say the strap is made out of about $\frac{3}{4}$ -inch nylon. It is a very light piece, it runs about six feet, two pieces—

Q. In length?

A. In length, and it is round, coiled.

Q. During the second trip, Mr. Dragich, I am taking your attention now to the second trip, did you see Mr. Strika faint? A. I did not.

Q. Did it come to your attention in any manner that he had fainted?

A. Yes. The crew told me about it.

Q. After this incident, did you have a discussion with Mr. Strika? A. I did.

Q. Where was that discussion? [87]

A. In the galley on the boat.

Q. When?

A. I imagine it probably was a week or so after. But as far as my knowledge goes, I have no knowledge of his fainting.

Q. Other than what was told you?

A. What was told to me.

Q. Did the crew inform you that it was more than once? A. No. They informed me it was once.

Q. At the time that you had this conversation with him, what was said?

(Testimony of Joseph P. Dragich.)

A. He says, "It is nothing, it is just too darn hot down here," he says, "Like the first trip." Which we worked I would say about 1200 miles further to the northwest, which was colder weather. It didn't bother him, but he says, "That doggone heat down there, it is too much for me, I can't take it." He says, "Right now all I have got is a headache."

Q. During the second trip, let's take the period of time of the second trip, prior to your having knowledge that Mr. Strika had fainted, as compared to the first trip were his actions any different?

A. No, I wouldn't say they were.

Q. What were his particular duties aboard for that period time, prior to your having knowledge of his fainting? [88]

A. Let's put it this way: Toward the end of the first trip Mr. Strika was taking care of this hook—

Mr. Strika: Excuse me, Dragich, that was second trip.

The Court: You be quiet.

Mr. Strika: I am sorry.

The Witness (Continuing): So the beginning of the second trip it was the same way. The fact is that Mr. Mosich, Toma Mosich, one of the crew members, who was on the strap or next to the corks, he would go over and reach for the hook or the strap to help him out.

Q. (By Mr. Karmelich): Subsequent to the report of this fainting spell to you, were his actions or was his work any different than before this report came to you?

(Testimony of Joseph P. Dragich.)

A. To the best of my ability, to answer that truthfully, I do not believe that there was any difference.

Q. It is your testimony that his actions during the first trip and the second trip—

A. Were just about a stand-off, I would say.

Q. During the second trip, Mr. Dragich, did the crew complain to you of the work being done by Mr. Strika?

A. Well, they all jumped my back, "How the devil are we going to have a man ride on our backs all the time? Do we have to carry a man to that extent?"

Mr. Finkel: May I have the last question and answer read, please?

(The question and answer were read by the reporter.)

Q. (By Mr. Karmelich): At the completion of the second trip it has been testified that you arrived at San Pedro, California, on or about January 13, 1960; then it has likewise been testified that you unloaded your catch of fish; did you have any conversation after the second trip and after you unloaded this fish, with Mr. Strika, as to his further employment?

A. Well, as reluctant as I was of letting him go, I told him that that was it, that I couldn't carry on, or else he has to stay up with the rest of the crew.

Q. Did you at that time tell him he was no longer employed?

A. Well, I didn't know that the crew signed—

Q. At this time that you told him that, you had not fired him?

A. No, I did not.

(Testimony of Joseph P. Dragich.)

Q. When was the next occasion that you had to see Mr. Strika?

A. Well, I think it was the following day when the crew presented me with that note which you presented as evidence—

Q. You mean Respondent's A that you identified?

A. Right.

I was forced to relieve Strika of his duties. Either [90] that or lose the rest of my crew, which would be darn hard to replace.

Q. Mr. Dragich, at that time that this document was presented to you, did you have any discussions at or about that time with Mr. John Royal, Mr. Strika's union representative?

A. That come after this note was presented to me by the crew members. I think it was the following day.

Q. Was Mr. Strika present?

A. I think he was on the dock.

Q. Was he within earshot or could he hear the conversation? You don't know?

A. No, I wouldn't say either way.

Q. Then we won't ask about that conversation at this time.

After that time you made a subsequent trip?

A. That's right.

Q. And Mr. Strika did not sail with you?

A. No.

Q. Did Mr. Strika ever come up to you and state, "I have been to a doctor, here is a slip, he says I can go fishing," or "I am fit for duty"?

(Testimony of Joseph P. Dragich.)

A. Right, he did.

Q. At that time what did you tell him?

A. I told him—I showed him that paper, I said, “I am sorry. Whether you are fit for duty or not, it is easier to [91] find one man than it is to find another ten.”

According to the contract with the union—

Q. We won’t go into that.

A. —that relieved me of that duty.

Mr. Karmelich: Okay, Mr. Dragich, that is all.

Cross-Examination

By Mr. Finkel:

Q. Mr. Dragich, you knew the libelant, Mr. Strika, for about five or six years before he went sailing with you, did you not?

A. Somewheres in that neighborhood. Maybe five, six months, or a year differential. I won’t argue over it.

Q. When you lost your crew member, which led you to call upon Mr. Strika in September of ’59 to replace that lost crew member, you contacted him and you were trying to get him to come to work with you?

A. Yes, through the women, through the families.

Q. As a result—

A. As a result—

Q. Let me finish. As a result, you contacted him and he came to work for you at your request, isn’t that right? A. Yes.

Q. When you shipped out on this first trip starting late September 1959, you said, I think, it took you about

(Testimony of Joseph P. Dragich.)

[92] three, four days to get to the fishing grounds, is that right, is that a fair statement?

A. It is about 56 hours after leaving port.

Q. During that time the men who are on the crew don't do any strenuous work, do they?

A. No. It is just odds and ends, just pick up here and there, change ropes and what have you on the boat.

Q. What do you usually do during that time?

A. Me?

Q. Yes, as the skipper.

A. I supervise these odds and ends that has to be done, see that the rigging is changed, if necessary, or whatever ropes have to be changed.

Q. And you are a pretty busy man during that time, aren't you?

A. Definitely busy.

Q. Being a busy man like that, it is possible that your mind was on your business, which it should have been, and as you said in your direct examination, everything was slow, it is pretty hard to make any specific observations with any man; is that right?

A. That's right.

Q. Then about the fourth day or the 56th hour, or something like that, the fishing began?

A. Right. [98]

Q. From that time on, that is when the heavy work began on this first trip, that is when the real operation got under way?

A. Yes, that is when the tension begins.

Q. That is a curious statement you just made, "when the tension begins."

The Court: Keep your voice up, counsel.

(Testimony of Joseph P. Dragich.)

Q. (By Mr. Finkel): What do you mean when you say "tension begins"?

A. Anxiety whether you are going to find the fish or not.

Q. I see what you mean. At the time that you hired Mr. Strika when you first sailed off, as far as you knew you had hired a healthy, able-bodied seaman, had you not?

A. I was under that assumption.

Q. And you base this feeling upon what you knew about this man in the past, and what you had observed up to that time, is that correct? A. Correct.

Q. Do you remember when it was that the first complaint was made to you on the first trip according to your testimony about Mr. Strika's work?

A. Yes. They were on the way home mostly, am I going to keep the man on.

Q. While you were on the way home on the first trip and [94] these first complaints were made to you, do you remember what the complaints were?

A. No. It was non specific, let's put it that way, but there was growling from all sides.

Q. In other words, when you were on your way back from the first trip there was a lot of grumb among the crew that Mr. Strika wasn't doing his work?

A. The man that was sitting here just prior to me did more grumbling than any one of them.

Q. When you got back at the end of the first trip and then the unloading process began—is that right?

A. Right.

(Testimony of Joseph P. Dragich.)

Q. Did Mr. Strika participate in that?

A. You might call it that.

Q. Tell us what you mean by that.

A. Any man that doesn't keep up his end, he is—there is three men on each side to a bucket, and when we have to wait for that bucket to be taken out of the fish hold, somebody is just not producing.

Q. Do you remember what it was that Mr. Strika was doing or not doing during that unloading process?

A. Hardly. Because I am very seldom down on the boat when we are unloading.

Q. Does that mean that you didn't have occasion to see it carefully and you are basing this on what you heard, or did [95] you actually see this inability to work?

A. Wait a minute. Let me get that straight.

Q. Let's be sure we get it straight, because it is important to know what you did see. Let me rephrase my question. My question is this:—

A. If you don't mind, speak a little slower and a little louder.

Q. I will do my best.

During the unloading process at the end of the first trip I would like you to tell the court what you observed with respect to Mr. Strika's work in that unloading process. A. Very slow.

Q. What did you—

A. By that I mean that he does not keep up with the rest of the gang or his side.

Q. Just exactly what did you see Mr. Strika do or

(Testimony of Joseph P. Dragich.)

not do during the unloading process? What did you see, yourself?

A. I seen him on deck guiding the bucket down into the hatch, and I did see him once or twice down in the hatch putting the fish in the bucket.

Q. And then you shipped out on the second trip, is that right?

A. Yes. More or less because of family relations.

Q. When you got out on the second trip, the complaining continued, didn't it, about Mr. Strika's work?
[96]

A. Right.

Q. Tell us about that.

A. There just isn't too much to be said about it. The crew kept complaining, "What the devil, am I going to keep doing that man's work and my own?"

If we sent him for any piece of rope or a strap or anything, there would be one of the young fellows that would jump and grab it and bring it back before he would even turn around.

Q. This is what you observed happen on the second trip?

A. Not only the second, but the first trip, too.

Q. Let me interrupt you for a moment. What I would like to ask you about is—not to hide other things, but just to ask you for a moment about something that happened on the second trip. Okay?

A. That's right.

Q. That's what I am directing my question to now. I would like to know what you observed about Mr. Strika's work with your own eyes on the second trip.

A. Slow.

(Testimony of Joseph P. Dragich.)

Q. What do you mean when you say, "Slow"?
Just exactly what did you see?

A. A man is definitely slow—

Q. Just what did you see?

A. Slow movements. [97]

Q. What kind of slow movements?

A. When a man has slow movements, it takes him a half hour to turn around.

Q. Just tell me what you saw, sir.

The Court: Let him answer the question, counsel.
You asked him what he means by slow and then you won't let him answer it.

Mr. Finkel: I am not trying to be difficult—

The Witness: I think you are.

Mr. Finkel: If I was being difficult, it was just—

The Court: Just a moment, both of you.

Read the question to him and let him answer it.

(The question referred to was read by the reporter, as follows:

("Q. What do you mean when you say, 'Slow.'
Just exactly what did you see?")

The Court: Go ahead and answer the question. What do you mean when you say "slow"?

The Witness: We ask the man to go across the boat, which is 24 feet wide, and a young fellow from another job goes and jumps and brings the strap back. What would you consider it?

The Court: Never mind asking him questions. You just answer it.

The Witness: Well, I would consider that very slow.
[98]

(Testimony of Joseph P. Dragich.)

Q. (By Mr. Finkel): After the members of the crew or some of them told you on the second trip that Mr. Strika had fainted—and somebody did tell you that some time during the second trip? A. Right.

Q. After that did you have any occasion to observe Mr. Strika's face?

A. Yes. Couldn't help but observe it.

Q. Do you remember anything peculiar about his face? A. Nothing that I can name.

Q. Did you have occasion to observe his physical movements after that fainting report?

A. Approximately the same as before.

Q. Will you describe the physical movements that you saw, please?

A. I have already described one incident. I don't know how much more you want me to. But his movements were identical to those of the first or the second trip.

Q. I am not trying to get you to say anything you don't want to say. Please don't misunderstand me, Mr. Dragich. All I am asking you to do is to describe to the court the physical—you say he was moving slowly; I would like to know just exactly what type of physical movements you saw him make that stand out in your mind, if there are any that stand out in your mind. If there aren't, there aren't. [99]

A. When a man is slow, he is just slow. If you take a look at that man, he is heavy, he is just slow, unable to stand up and work with the rest of the crew members. That is in movement or any other way.

Q. When you had the conversation with Mr. Strika

(Testimony of Joseph P. Dragich.)

on the second trip after you were told that he fainted, when you say he said, "It is too hot, I have a headache," how did he appear to you to look at that time?

A. Frankly, he had a little more color because he was sunburned. But outside of that I couldn't see any difference than the first trip.

Q. Would you say that during the latter part of the second trip that Mr. Strika was pretty much—in terms of being productive on the ship—was pretty much worthless? A. Very much so.

Q. Would you say this was true throughout the second trip?

A. I would say it was true throughout both of the trips that he was present.

Q. You would say that he was pretty much worthless throughout both trips? A. That's right.

Q. Would you say that he was pretty much worthless from the very beginning of the first trip?

A. Well, the first two or three days I would say he was [100] trying to keep up the pace with the young fellows.

Q. Was there any point during that first trip where you saw a switch or change? A. No, no.

Q. So you would say—

A. It was just one of those things.

Q. The question is, just exactly what we mean by one of those things.

A. Let's assume that one person is livelier than the next fellow, we see that every day where we have so many changes on our boats.

Q. Did you have occasion to talk to Mr. Strika

(Testimony of Joseph P. Dragich.)

while the ship was in port after the first trip about the complaints you had heard? A. Yes.

Q. Did you have occasion to talk to him about these complaints while you were still on the vessel coming in from the first trip?

A. Yes. The gang was after me and I spoke to him about it, to see if I could perk him up, because one fellow in particular was always on my back about him.

Q. Do you remember who that was?

A. Yes, Mr. Mosich, Toma Mosich.

Q. On the first portion of the first trip did you observe Mr. Strika to drool, or anything like that? [101]

A. Yes.

Q. When did you see it for the first time?

A. I think it was about a week after. Somebody in the crew, I think it was right after dinner that it was more noticeable than any time of the day.

Q. Did you ever notice him to have a glassy stare?

A. Well, to the best of my ability, as far back as I can recall him he always had that.

Q. Do you remember whether he had—I am not talking about his stuttering now, I am talking about something aside from his stuttering—did you ever notice anything peculiar in his speech besides his stuttering?

A. He was always more or less sort of dragging the words out, except when singing.

Q. Except when singing?

A. Yes. He used to be quite a singer.

(Testimony of Joseph P. Dragich.)

Q. Do you remember how long ago that was?

A. Quite some time.

Q. Can you measure that in years?

A. Yes. I think that would be probably four, five years ago, something like that.

Q. Did you ever hear him sing during the second trip?

A. Yes. About a stand-off. He always tried.

Q. When you got back into port after the second trip and you told Mr. Strika that the crew said that he had to go— [102]

A. That's it.

Q. —did he say anything to you in response?

A. He says that he was going to raise hell with me. That's about it.

Q. Did he ever come back to you after that with a slip of some kind from the Public Health office?

A. Right.

Q. What happened then?

A. I told him that I was sorry, but it is easier for me to find one man than to find ten.

Q. Did he show you a fit-for-duty slip?

A. Yes, sir.

Q. Did you make any comment to him about that slip?

A. I told him that either he is laying down on the job—

Q. Did you say anything to him about that fit-for-duty slip?

A. Yes.

Q. What did you say to him?

A. Apparently he must have been laying down on the job while he was out with us, and he is pulling

(Testimony of Joseph P. Dragich.)

somebody's leg. He is not going to pull mine any more.

Q. Are those the things you said to him when he showed you a fit-for-duty slip?

A. That is correct. Any man who shows me a slip fit [103] for duty and he doesn't produce work on the prior trip, he has been pulling my leg.

Mr. Finkel: No further questions. Thank you.

Mr. Karmelich: That is all, Mr. Dragich.

I would like to call Mr. Nick Mirkovich.

NICHOLAS A. MIRKOVICH

called as a witness by and on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated and give us your full name.

The Witness: Nicholas A. Mirkovich.

The Clerk: Would you spell your last name?

The Witness: M-i-r-k-o-v-i-c-h.

Direct Examination

By Mr. Karmelich:

Q. Mr. Mirkovich, this is going to be very brief. You have been here, you have heard of two trips that the witnesses have testified about? A. Yes.

Q. One that commenced September and ended in October, one that commenced in November and ended in January of 1960. You were not on board the vessel for the voyage that ended January 13, 1960, were you? [104] A. No.

(Testimony of Nicholas A. Mirkovich.)

Q. You were on the voyage from September to October? A. Yes, I was.

Q. The first voyage of these two? A. Yes.

Q. At that time Mr. Strika was aboard the vessel, was he not? A. Yes, he was.

Q. Did you observe Mr. Strika's actions prior to making any set, that is, his movements about the ship, walking? A. It was slow.

Q. Did you ever see him attempt to light a cigarette? A. Yes.

Q. Will you describe just what you saw?

A. Well, it would take him—you know, like a normal guy would go like that (indicating), it would take him a little time.

Q. Take him a long time?

A. A lot longer than it takes to just strike a match.

Q. Did you observe anything about any saliva on his face?

A. Sometimes when he would take his cigarette from his mouth, you would.

Q. It would drool down his lower lip?

A. Yes. [105]

Q. To your knowledge—let's put it this way: Did you complain about the work of Mr. Strika during the first trip?

A. It was just slow. It is hard to keep up—it is harder for everybody else, you know, when one guy can't keep up with you, it is tougher.

Q. Would you say this is a fair statement—that this slowness prevented the rapidity of bringing in the net? A. Yes.

(Testimony of Nicholas A. Mirkovich.)

Q. There has been a conflict in statements here as to whether this man was on the corks only during the first trip or whether he was on the hook, lead line, web, and everything. To the best of your recollection, can you recall exactly what duties he had?

A. I know he was on the corks. I know once that old man Mosich was on the corks, but I don't remember how often. I didn't pay much attention. I forgot. It was quite a while ago. I remember he was on the corks.

Q. You can't remember his specific job?

A. On the corks, mainly.

Q. But you can't recall whether he ever handled the hook?

A. No, I really can't.

Q. Or the lead line or on the web?

A. No, I can't.

Q. I show you a document, Mr. Mirkovich, which has been [106] introduced into evidence as Respondent's A, and ask you whether you have ever seen this document.

A. Yes.

Q. Does your signature appear thereon?

A. Yes.

Q. Is that the second signature below Daniel Gellum?

A. Yes.

Q. Was this document signed by you after the second trip?

A. Yes.

Q. You did not make the second trip?

A. No, I didn't.

Q. Why was that, will you tell the court?

A. I stood home for one trip.

(Testimony of Nicholas A. Mirkovich.)

Q. Is that because you were to be examined for induction?

A. Yes. Then I had my cousin take my place for one trip.

Q. And you were not inducted so then you returned to the vessel? A. Yes.

Q. Did you read the above paragraph?

A. Yes.

Q. Before you signed this document?

A. Yes. [107]

Q. You signed this document because of your observation of Mr. Strika on the first trip? A. Yes.

Mr. Karmelich: That is all of this witness.

Mr. Finkel: I have no questions.

Mr. Karmelich: Respondent rests.

The Court: Do you have anything further?

Mr. Finkel: Nothing further from respondent, your Honor.

The Court: Do you want to state your argument now or do you want to wait until this afternoon?

Mr. Finkel: I prefer to wait, your Honor, if the court will permit.

The Court: All right. We will recess until 2:00 o'clock.

Mr. Karmelich: Counsel, you are not bringing any more witnesses, are you?

The Court: You both have rested.

Mr. Karmelich: Yes.

Mr. Finkel: Your Honor, if the court will permit me, I would like to make one statement, if I may.

The Court: Yes.

Mr. Finkel: I have been considering the advisability in terms of representing my client's case in the manner which I think most appropriate, to bring one rebuttal witness to the [108] respondent's case. That witness is not available at this time. That witness may or may not be available within the next hour. I will know in a few moments. I don't know right now. I will know within a matter of moments.

The Court: If you bring the witness in, you may put the witness on at 2:00 o'clock.

Mr. Karmelich: I just wanted to know.

(Whereupon, at 11:50 o'clock a.m., an adjournment was taken to 2:00 o'clock, p.m.)

[Endorsed]: Filed July 31, 1961.

[Endorsed]: No. 17500. United States Court of Appeals for the Ninth Circuit. Joe Dragich and Van Camp Sea Food Company, Inc., Appellant, vs. Nikola Strika, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: August 2, 1961.

Docketed: August 10, 1961.

/s/ FRANK H. SCHMID.

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 17500

JOE DRAGICH and VAN CAMP SEA FOOD COM-
PANY, INC.,

Appellants,

vs.

NIKOLA STRIKA,

Appellee.

STATEMENT OF POINTS ON APPEAL AND
DESIGNATION OF RECORD ON APPEAL.

Joe Dragich, et al., appellants in the above entitled case, hereby adopt the statement of Points on Appeal and Designation of Record on Appeal filed heretofore in the United States District Court in and for the Southern District of California, Southern Division.

Dated: August 25, 1961.

KARMELICH AND FELANDO
/s/ By JOHN J. KARMELICH

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Aug. 28, 1961. Frank H. Schmid,
Clerk.

No. 17503.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MEYER HARRIS COHEN, also known as MICHAEL
"MICKEY" COHEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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FILED

OCT 29 1961

FRANK H. SCHMID, CLERK

TOPICAL INDEX

	PAGE
I.	
Jurisdiction	1
II.	
Statutes involved	2
III.	
Statement of the case.....	3
IV.	
Statement of facts.....	4
A. Introduction	4
B. Count One	5
C. Count Two	7
1. Promotion income.....	7
2. Interest income	13
3. Vending machines	14
4. Other income	16
5. Life story income.....	18
D. Count Three	19
1. Owners, authors and producers.....	19
2. Financiers	29
E. Count Four	46
1. Denied to agents of the Internal Revenue Service that he had any assets.....	53
2. Placed and caused to be placed his assets in the names of others.....	53
3. Deposited his assets with other persons.....	53
4. Dealt in currency.....	54
5. Caused his obligations to be paid through and in the names of other persons.....	54

	PAGE
6. Caused monies paid to him to be paid through and in the names of other persons.....	55
7. Paid and caused to be paid his creditors other than the United States of America.....	55
F. Counts Five through Eight.....	56
G. Count Nine	58
H. Count Ten	60
I. Count Eleven	62
J. Count Twelve	64
K. Count Thirteen	65

V.

Argument	69
A. Preliminary statement	69
B. Summary of appellee's argument.....	70
C. There was no error involved in the jury instructions given and refused relating to Counts Two and Three of the indictment; and the verdict as to Counts Two and Three was supported by substantial evidence and was not contrary to the weight of evidence.....	72
1. The rules of this court pertaining to assigning jury instructions as errors on appeal were not followed	72
2. Rule 30 of the Federal Rules of Criminal Procedure was not followed.....	73
3. The trial court did not err in refusing to give appellant's requested instruction No. 18, because it gave it in substance and effect.....	74
4. The trial court did not err in refusing to give appellant's requested instruction No. 26, because it is an unsupported conclusion of fact and not a statement of law.....	74

5.	The trial court did not err in refusing to give appellant's requested instructions Nos. 63, 74-80, relating to California crimes, because said instructions do not set forth applicable law; and the court did not err in giving its instructions as to what constitutes income because said instructions do set forth applicable law.....	75
6.	The verdict of guilty as to Counts Two and Three was supported by substantial evidence and was not contrary to the weight of evidence.....	85
7.	The trial court did not err in refusing to give appellant's requested instructions Nos. 37, 49, and 56 pertaining to lesser included offenses, because they are legally inaccurate.....	92
D.	It was not error for the trial court to admit the testimony pertaining to religious activities, matters and beliefs of appellant because such testimony was relevant and material to issues in the case.....	96
E.	The requirements of law that appellant receive notice of the deficiency were complied with.....	99
1.	The mailing of the notice of deficiency was in compliance with the statutory requirements.....	99
2.	The law does not require the government to give personal notice of a deficiency, and in any event the evidence shows that appellant had personal knowledge of the deficiency.....	101
F.	Appellant was not placed in double jeopardy.....	103
1.	26 U. S. C. 7201 defines more than one offense....	103
2.	Appellant was not prosecuted twice on the same facts or transactions.....	104

	PAGE
G. The verdict of guilty as to Counts Five, Eight, Nine and Ten was supported by substantial evidence and was not contrary to the weight of evidence.....	104
H. Appellant was properly convicted of violating 18 U. S. C. 1001.....	106
I. The court did not err in denying appellant's motions for mistrial	108
1. Appellant was not denied his right to counsel because his attorney was a government witness.....	108
2. The court did not err in denying appellant's motions for mistrial based on newspaper publicity....	116
VI.	
Conclusion	118

TABLE OF AUTHORITIES CITED

CASES	PAGE
Achilli v. United States, 353 U. S. 373.....	95
Akers v. Scofield, 167 F. 2d 718, cert. den. 335 U. S. 823.....	80
Barack v. United States, 56-2 USTC., para. 9961.....	100
Bardin v. United States, 224 F. 2d 225, cert. den. 350 U. S. 380, rehear. den. 350 U. S. 919.....	103
Boren v. Riddell, 241 F. 2d 670.....	100, 102
Brandow v. United States, 268 F. 2d 559.....	108
Briggs v. United States, 214 F. 2d 699, cert. den. 348 U. S. 864	80
Briggs v. United States, 221 F. 2d 636.....	116
Bruswitz v. United States, 219 F. 2d 59, cert. den. 349 U. S. 913	80
Cohen v. United States, 201 F. 2d 386.....	108, 116
Commissioner v. Wilcox, 327 U. S. 404.....	83, 84
Cooper v. United States, 282 F. 2d 527.....	108
Davis v. United States, 226 F. 2d 331, cert. den. 350 U. S. 965	76, 78, 80
Dawkins v. Commissioner of Internal Revenue, 238 F. 2d 174	78
DeCasaus v. United States, 250 F. 2d 150.....	108
Dillon v. United States, 218 F. 2d 97, cert. den. 349 U. S. 914, dism. 350 U. S. 906.....	95
Goldring v. Goldring, 94 Cal. App. 2d 643, 211 P. 2d 342.....	87
Gregory v. United States, 57 Fed. Supp. 962.....	100
Hickson v. Thielman, 147 Cal. App. 2d 11, 304 P. 2d 122.....	86
James v. United State, 366 U. S. 1.....	80, 83, 84
Jolly v. United States, 232 F. 2d 83.....	116
Kann v. Commissioner of Internal Revenue, 210 F. 2d 247, cert. den. 347 U. S. 967.....	80

	PAGE
Knowles v. United States, 224 F. 2d 168.....	108
Lawn v. United States, 355 U. S. 339.....	103
Marienfeld v. United States, 214 F. 2d 632, cert. den. 348 U. S. 865.....	80
Marshall v. United States, 360 U. S. 310.....	116
Maxfield v. United States, 153 F. 2d 325.....	99
McCosker v. McCosker, 122 Cal. App. 2d 498, 265 P. 2d 21..	86
People v. Ashley, 42 Cal. 2d 246, 267 P. 2d 271, cert. den. 348 U. S. 900.....	89
People v. Krupnick, 165 Cal. App. 2d 755, 332 P. 2d 720.....	90
People v. Lathom, 192 A. C. A. 239.....	116
People v. Reinschreiber, 152 Cal. App. 2d 750, 313 P. 2d 890	90
People v. Safka, 174 Cal. App. 2d 312, 344 P. 2d 619.....	90
Peters v. Wallace, 127 Okla. 182, 260 Pac. 42.....	87
Pfeffer v. Commissioner, 272 F. 2d 383.....	100
Rollinger v. United States, 208 F. 2d 109.....	90
Rutkin v. United States, 343 U. S. 130.....	79, 83, 90
Sazear v. Pendergrass, 39 Ariz. 111, 4 P. 2d 386.....	87
Smithpeter v. Wabash R.R., 360 Mo. 835, 231 S. W. 2d 135..	87
Spies v. United States, 317 U. S. 492.....	95
State v. Johnson, 39 Idaho 440, 227 Pac. 1052.....	87
Tenzer v. Commissioner, 285 F. 2d 956.....	100
United States v. Berra, 351 U. S. 131.....	95
United States v. Davey, 155 Fed. Supp. 175.....	107
United States v. Foley, 290 F. 2d 562.....	95
United States v. Gilliland, 312 U. S. 86.....	107

	PAGE
United States v. Hoover, 233 F. 2d 870.....	95
United States v. Lee, 238 F. 2d 341.....	95
United States v. Levin, 133 Fed. Supp. 88.....	107
United States v. Mollet, 290 F. 2d 273.....	103
United States v. Moran, 236 F. 2d 361.....	95
United States v. Penna, 229 F. 2d 216.....	116
United States v. Phillippe, 173 Fed. Supp. 582.....	107
United States v. Postma, 242 F. 2d 488.....	116
United States v. Yuncker, 147 Fed. Supp. 97.....	95
Wallace v. United States, 281 F. 2d 656.....	77
Williams v. United States, 264 F. 2d 227.....	100
Wilson v. United States, 250 F. 2d 312, rehear. den. 254 F. 2d 391, new trial granted 264 F. 2d 74.....	103
Wyss v. United States, 239 F. 2d 658.....	80
Yates v. United States, 225 F. 2d 146.....	116

RULES

Federal Rules of Criminal Procedure, Rule 30	70, 73
Federal Rules of Criminal Procedure, Rule 38(a)(2)....	48, 101
Rules of the United States Court of Appeals, Ninth Circuit, Rule 18	72, 92, 96

STATUTES

United States Code, Title 18, Sec. 35.....	107
United States Code, Title 18, Sec. 1001.....	
.....1, 2, 47, 71, 103, 106, 107, 108	
United States Code, Title 18, Sec. 3231.....	1
United States Code, Title 18, Sec. 3568.....	101
United States Code, Title 18, Sec. 4082.....	101

	PAGE
United States Code, Title 18, Sec. 4083.....	101
United States Code, Title 18, Sec. 4086.....	101
United States Code, Title 26, Sec. 61.....	77
United States Code, Title 26, Sec. 145(b).....	47, 103
United States Code, Title 26, Sec. 272(d)	102
United States Code, Title 26, Sec. 272(K).....	99, 101
United States Code, Title 26, Sec. 7201.....	
.....	1, 2, 71, 92, 94, 95, 103, 104
United States Code, Title 26, Sec. 7203.....	92, 94, 95
United States Code, Title 26, Sec. 7206(4).....	1, 2, 94
United States Code, Title 26, Sec. 7207	92, 94
United States Code, Title 28, Sec. 1291.....	1
United States Code, Title 28, Sec. 1294(1).....	1

No. 17503.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MEYER HARRIS COHEN, also known as MICHAEL
"MICKEY" COHEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

JURISDICTION.

Appellant was indicted by the federal Grand Jury in and for the Southern District of California on September 16, 1960 in thirteen counts for violations of 26 U. S. C. 7201, 26 U. S. C. 7206(4), and 18 U. S. C. 1001 [C. T. 2].¹

Appellant was arraigned, pleaded not guilty, made numerous pre-trial motions, was tried by a jury, and convicted on eight counts on June 30, 1961. On July 1, 1961 he was sentenced to fifteen years' imprisonment and a \$30,000 fine. Appellant made several post-trial motions. On July 20, 1961 appellant filed a Notice of Appeal from the judgment of conviction.

The United States District Court for the Southern District of California had jurisdiction of the cause of action under 18 U. S. C. 3231. This Court has jurisdiction under 28 U. S. C. 1291 and 1294(1).

¹C.T. refers to Clerk's Transcript.

II.

STATUTES INVOLVED.

The Indictment was brought under three different statutes which provide, in pertinent part, as follows:

18 U. S. C. 1001.

“Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.”

26 U. S. C. 7201.

“Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.”

26 U. S. C. 7206(4).

“Any person who—

* * * * *

“Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which

evade or defeat the assessment or collection of any tax imposed by this title; . . .

* * * * *

“shall be guilty of a felony and, upon conviction thereof, shall be fined not more than \$5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.”

levy is authorized by section 6331, with intent to

III.

STATEMENT OF THE CASE.

On September 16, 1960 appellant was indicted in thirteen counts [C. T. 2]; he was arrested the same day and moved for a reduction in bail in the United States District Court, which was granted [C. T. 16].

Prior to trial, appellant was arraigned, pleaded not guilty, and there were many motions, the rulings on which are not specifically contested by appellant on this appeal, including the following motions: to leave the jurisdiction, to remain outside of the jurisdiction, to increase bail, to reduce bail, for a bill of particulars, to dismiss the indictment, to suppress evidence, and for continuances. Also prior to trial, there were hearings on some of the motions and pre-trial conferences [C. T. 2-294].

On May 2, 1961 jury trial commenced before United States District Judge George H. Boldt. On June 28, 1961 the case was given to the jury, and two days later the jury returned its verdict acquitting appellant on five counts and convicting appellant on eight counts [C. T. 592].

On July 1, 1961 Judge Boldt sentenced appellant [C. T. 593-5].

On July 5, 1961 appellant moved for a new trial, which was denied by Judge Boldt on July 20, 1961;

immediately thereafter appellant filed his notice of appeal.

On October 2, 1961 appellee received appellant's brief in which there are eighteen errors specified and nine arguments.

Parts of this case have been upon appeal to this Court on two prior occasions, once before trial and once after conviction.

IV. STATEMENT OF FACTS.

A. Introduction.

The trial in this case lasted some forty-two days. Some 190 witnesses testified; several thousand documents were introduced into evidence; and the reporter's transcript of just the trial is nearly 8000 pages in length. Appellant in his opening brief does not provide this Court with a statement of facts, but rather says, at page 5: "The numerous and extensive transactions touched upon during the trial preclude a detailed statement of the case"; and he then gives, in less than three pages, a "broad general outline" of "those facts and circumstances necessary to acquaint this Court with the issues pertinent to this appeal." After this introduction appellant then very briefly sketches some facts pertaining to Count One (appellant was acquitted on this count); then he briefly outlines several factors relating to Counts Two and Three; he then outlines Counts Five through Eight in two sentences, and Counts Nine through Eleven in another sentence; no factual reference is made to Counts Four, Twelve or Thirteen. Appellant argues the sufficiency of the evidence on some counts, and therein he also briefly summarizes some of the evidence.

In view of the foregoing, appellee does not feel that this Court, or any court, expects or requires appellee

to set forth an exhaustive review of the evidence. However, appellee will attempt to set forth a more comprehensive analysis of the facts pertaining to each count of the Indictment.

This Court may find it helpful in reviewing the reporter's transcript to utilize the index of exhibits received in evidence—this index itself was made an exhibit [Court's Ex. 7]. Prior to trial appellee started an exhibit register in which each exhibit is numbered, briefly described, and the foundation witness is identified. This register was always in advance of the trial proceedings, and copies of this register were supplied by appellee to the trial court, appellant's counsel, the court clerk, and the court reporter. The court clerk's copy of this register is Exhibit 949 not in evidence. This register lists all the exhibits numerically, including those that were marked for identification and never received into evidence. This Court may also obtain a general outline of the case from counsel's closing arguments [R. T. 7609-7969].²

B. Count One.

Count One of the Indictment charges that on July 15, 1957, appellant attempted to evade and defeat his and his wife's income taxes for 1956 by filing a false and fraudulent joint income tax return in which their income was listed as \$1200.00 and the tax due thereon was none; whereas, their income was \$3750.00 and the tax due thereon was \$440.00.

Appellant was found not guilty on this count.

In early 1956 appellant went to work for Michael's Greenhouses, Inc., a newly organized business belonging to Ruth Fisher Benson and her brother Harmon

²R.T. refers to Reporter's Transcript.

Eldridge [R. T. 245; 256]. This business was sold to Lee and Elinore Churchin in July of 1956 for \$15,000 [R. T. 271; 407], and, at appellant's request, his sister, Lillian Weiner, took over the business in the fall of 1956 and operated it until August 29, 1957 when she sold it for \$15,000.00 to Joel K. Hamamoto [R. T. 953; 956]. During the period of his employment by the Greenhouse business appellant was the beneficiary of some \$53,225.40 which was paid out by the Greenhouse either to him or on his behalf [Ex. 947], excluding any salary or commissions he received.

In 1956 appellant received, at one time, six \$200.00 salary checks minus deductions, and this constitutes the \$1200.00 appellant reported on his 1956 tax return [Exs. 1, 130]. There were three additional checks received and cashed by appellant in 1956; all three check stubs are in evidence and one check is in evidence [Ex. 131, stubs 278, 288; 134-E; 138-G]; two of these check stubs—one for \$50.00 and one for \$2000.00—are labeled "Commissions" and the third check and stub contain no notations but the workpapers of the Greenhouse's accountant, Samuel Chilkov [Ex. 158-J not in evidence], show that it was originally a commission item which was transferred to the loan payable account by a journal entry [R. T. 6440-6452].

Although the Greenhouse business was always operated at a loss, some hundred thousand dollars was funneled through its bank accounts prior to September of 1957. Some of the accounting books of the business are in evidence (others were never located), and many bank records, check books and statements were received in evidence. Some of these books and records are also pertinent in tracing money that appellant received that was labeled as "loans" or that constituted "life story receipts."

C. Count Two.

Count Two of the Indictment charges that on April 15, 1958 appellant attempted to evade and defeat his and his wife's income taxes for 1957 by filing a false and fraudulent joint income tax return in which their income was listed as \$1272.84 and the tax due thereon was none; whereas, their income was \$44,918.14 and the tax due thereon was \$16,042.16.

Appellant was found guilty on this count.

In the year 1957 appellant and his wife reported on their joint tax return \$1272.84 as income [Ex. 2]. It was stipulated that this sum was earned by La Vonne Cohen, appellant's wife, from the sale of gift items [Court's Ex. 1]. Appellant, in 1957, received an additional \$46,645.30, which was not reported, from other sources which were categorized [Ex. 943-C] as follows:

1. \$3,350.00 — promotion income;
2. \$1,795.30 — interest income;
3. \$3,000.00 — vending machines;
4. \$6,000.00 — other income;
5. \$32,500.00 — life story income.

Total — \$46,645.30

1. Promotion Income.

W. C. Jones met appellant in the late 1930's while attending prize fights [R. T. 754]. In 1952 Mr. Jones was converted to Christianity and from that day on he has been extremely active as an evangelist, and has been financially successful in his business [R. T. 761]. Appellant was released from federal prison in October of 1955, and shortly thereafter Mr. Jones, along with James A. Vaus, Jr., another evangelist and an ordained minister, met with appellant in order to encourage him

spiritually [R. T. 761]. At the conclusion of this meeting Mr. Jones gave appellant \$85.00 [R. T. 764]. After this meeting, appellant, who had indicated that he was broke [R. T. 704], received financial assistance from the Jim Vaus Evangelistic Association, a California nonprofit corporation; he received \$2494.12 up to and including July 2, 1956, including about \$1,000.00 in cash, over \$400.00 paid on telephone bills, \$270.00 on apartment rent, and payment of a doctor bill. Appellant also received personal gifts like stationery, the free use of an office and the free use of Mr. Vaus' personal car, including the use of a credit card [R. T. 704-712; Exs. 259-269].

Mr. Vaus also arranged for appellant to meet with Vernon Blythe, a well-to-do business man interested in evangelical activities. In March of 1956 appellant asked for and received \$3000.00 from Blythe, and in May of 1956 he received another \$3000.00. Both of these transactions were set up as loans complete with promissory notes signed by appellant and, though due and payable in 1956, they were never repaid by appellant [R. T. 713-717; 2550-2563; Exs. 511-514].

In 1957 appellant again asked Mr. Blythe for financial assistance and was told "money is not your problem now, or has it ever been your problem; I really honestly believe that there is only one thing for you to do and that is to turn your life over to God and let Him intervene" [R. T. 2566]. Blythe refused to give further financial assistance to appellant.

During the period from the end of 1955 until December 31, 1956 when appellant was receiving financial help from these men on the basis that appellant was broke, appellant also received in excess of \$25,000 in currency from other sources [Ex. 945].

In January of 1957 appellant contacted Mr. Jones whom he had not seen in over a year and requested a meeting which took place at a restaurant in Los Angeles and lasted some five hours, during which appellant's need for money and spiritual assistance was discussed [R. T. 763]. When they left the restaurant they went to appellant's apartment, prayed together for twenty minutes, then knelt and appellant verbally accepted Jesus Christ and turned his life over to Christ [R. T. 765]. Mr. Jones then told appellant, "You are my Christian brother now, and I want to know your needs" as we are to share our needs [R. T. 766].

Appellant's needs were financial. The month after, February 1957, appellant asked Mr. Jones to call his Christian friends to raise \$10,000 as appellant was involved in a legal situation. Mr. Jones, to show appellant that he was on appellant's side, paid \$1000.00 to appellant's then attorney, Rexford Eagan [R. T. 775, 776; Ex. 289]. Also, in February 1957 Mr. Jones gave appellant \$300 in cash [R. T. 758, 776, Ex. 290]; and in March of 1957 Mr. Jones gave appellant \$250.00 [R. T. 759, 777; Ex. 292]. On April 1, 1957 Mr. Jones paid Attorney Charles Hollopeter \$299.77 on behalf of and at the request of appellant [R. T. 755, 759, 768; Exs. 281, 293]. All of the expenditures of Mr. Jones on behalf of appellant were gifts; they were never thought of by Jones as loans; there were no notes [R. T. 767, 768]. During this same three months of 1957 appellant also received in excess of \$20,000 in currency from other sources [Ex. 945].

In April of 1957 Mr. Jones and Mr. Vaus were concerned with the lack of spiritual growth in appellant, and knowing of appellant's affection for Billy Graham they arranged to send appellant from Los Angeles, California, to New York, New York for a two-day trip to

meet privately with Billy Graham for prayers, advice and encouragement as to how to arrange the affairs of his life [R. T. 729, 730, 769]. In a matter of hours after the decision to have this meeting in New York, appellant was taken to the airport, given a first-class round trip ticket from Los Angeles to New York and given \$135.00 pocket money [R. T. 730, 731, 770, 771]. Arrangements were made to have appellant met at the New York airport; appellant did not meet them but rather went to the Waldorf-Astoria Hotel, took a suite there, and called a press conference [R. T. 732, 733, 771]. The press quoted appellant as saying he was considering Christianity, and, after seeing this, Mr. Jones telephoned appellant and told him, "we didn't send you back to consider a decision, we sent you back to cement one that you had already made" [R. T. 771]. Mr. Jones flew to New York that same night, met appellant at the Waldorf-Astoria, berated him for abusing the intent and purpose of the trip, and, after appellant showed him telegrams he had received from Jewish friends, appellant asked him to send \$1000 to Lillian Weiner, appellant's sister, as proof to her that appellant's Christian friends will help him and not let him down the minute he gets behind the eightball [R. T. 773-774]. Mr. Jones immediately sent the \$1000.00 [R. T. 774; Ex. 294].

Mr. Jones also consented to pay appellant's hotel bill for the one day, and left his credit card with the cashier to pay for the one day. Appellant stayed for nearly a week, ran up a bill of \$507.08 which was sent to Mr. Jones and paid for by him [R. T. 775; Ex. 296].

Appellant was in Chicago, Illinois at the Knickerbocker Hotel from April 28, 1957 to May 2, 1957 with five other men, most of whom appellant had invited as his guests to attend a championship fight; appellant paid his hotel bill and that of four of the guests in the total amount of \$514.15, and he also paid \$530.86 for

the air transportation for this trip with Greenhouse checks [Ex. 144-F, 148-E, Court Ex. 3; R. T. 847-849].

The day after appellant returned from Chicago he telephoned Mr. Jones and said, "Bill if you will just help me out this once more, this is all I need, I have some friends in Chicago that will help me financially and I think that this will really do it, and all I need is plane fare back to Chicago" [R. T. 778]. On that same day, May 3, 1957, Mr. Jones gave appellant \$300.00 [R. T. 778; Ex. 297], and that was the last financial transaction between appellant and Mr. Jones [R. T. 778].

Appellant's transportation to Chicago in May of 1957 was paid for by the producers of the Mike Wallace television program [Exs. 298-306]. Also, on that same date, May 3, 1957, appellant cashed \$7,345.30 worth of United States Savings Bonds [R. T. 788; Exs. 47; 176], and just two days before, on May 1, 1957, appellant cashed a \$3,000.00 check [Exs. 239, 945].

Gus the Great is a book written by Thomas Duncan, and the motion picture rights are held by a studio [R. T. 945].

Robert Goodstein, formerly a property man at a major motion picture studio in Los Angeles, wanted to put a deal together to make a picture based on *Gus the Great*, starring Jackie Gleason.

Barney Peller, a long-time acquaintance of appellant's from Cincinnati, Ohio, a promoter and salesman of home improvements and a second cousin to Robert Goodstein, introduced Goodstein to appellant in Los Angeles during March 1957. Goodstein told appellant about his ideas concerning *Gus the Great*; appellant indicated he knew Jackie Gleason and could see if he was interested in the starring role [R. T. 946].

When appellant was in New York at the Waldorf-Astoria at Mr. Jones' expense, he telephoned Barney Peller who was in Cincinnati, Ohio, and told him he was working on *Gus the Great* and making progress, but that expenses at the Waldorf were quite high so would Barney send him some money [R. T. 877]. Peller sent him \$500 labeled "for Gleason negotiations" [R. T. 878; Ex. 78]. The next day appellant called Peller again, and again Peller responded with \$500.00 labeled "Gleason negotiations" [R. T. 880; Ex. 79].

While in New York appellant did talk to Jackie Gleason's manager, George "Bullets" Durgom [R. T. 3590]; he did not talk or meet with Jackie Gleason [R. T. 3605].

All of appellant's transportation expenses from Los Angeles to New York and back, plus his hotel bill (including \$63.60 for candy [R. T. 756]), plus \$135.00 spending money, were taken care of by Mr. Jones, *supra*. Appellant received the \$1000.00 from Barney Peller for "Gleason negotiations" on April 2, 1957, and on April 6, 1957 while in New York at the expense of W. C. Jones, *supra*.

When appellant returned to Los Angeles he contacted Robert Goodstein and asked him to pay one-third of the \$3000.00 cost of the entire trip from Los Angeles to New York and back which appellant said would be about \$1000.00 [R. T. 949]. Mr. Goodstein did not have the \$1000.00 and did not pay it [R. T. 949].

The Government charged that the \$1000.00 received from Peller was unreported income [Ex. 943-C].

When appellant left the Waldorf-Astoria in New York and was on his way back to Los Angeles he stopped in Cincinnati, Ohio, where Barney Peller introduced him to Charles Schneider, a tree surgeon, and his pre-teen age daughter Janet, who was desirous of

becoming a singer with Barney Peller as her agent [R. T. 823, 891]. Appellant contacted Jerry Lewis and arranged for Janet to sing as a guest on the Lewis stage show then appearing in Cincinnati, Ohio. Appellant offered his services in promoting the career of young Janet, and on April 10, 1957 Charles Schneider handed appellant three checks: one for \$2500.00, one for \$2000.00, and one for \$350.00 [R. T. 827, 830; Exs. 271, 272, 273]. Mr. Schneider also paid appellant's hotel bill while he was in Cincinnati. The \$2500.00 check was for appellant's "life story," discussed below. The other two checks were for promotion of Janet's career as a singer [R. T. 830, 832].

In the summer of 1957 Barney Peller and the Schneiders drove to Los Angeles and remained for several weeks at their own expense, during which time appellant did take them out on numerous occasions [R. T. 837, 838]. Before making the trip, Barney Peller sent appellant \$500.00 obtained from Charles Schneider [R. T. 842, 843; Ex. 80].

Appellant did incur some expenses while the entourage was in Los Angeles, but the amount and nature of them are unknown [R. T. 852]. Appellant received \$2850.00 from Mr. Schneider to promote Janet's career, and \$2350 of it was alleged to be income to appellant [Ex. 943-C].

2. Interest Income.

On May 3, 1957 appellant cashed in United States Savings Bonds purchased in the early 1940's and received \$7345.30; these bonds cost \$5550.00; the difference of \$1795.30 was interest, and as such income of appellant [R. T. 789; Exs. 176, 943-C].

During the trial it was conceded by appellant that the \$1795.30 interest income should have been reported on the tax return for 1957 [R. T. 7779], and it was contended that appellant had forgotten he had them as

they were in the possession of Pauline Duitz, his sister [R. T. 7075-7078], who in October of 1955 helped appellant pay his \$10,000 fine [Ex. 587].

Two people testified about appellant's possession of these bonds prior to their encashment: James Vaus was told by appellant in late 1955 that appellant had some bonds but could not cash them because of the Government [R. T. 704]; and Robert Cowan, who in December of 1955 transferred \$500 to appellant and has not been repaid, saw bonds in appellant's possession at that time [R. T. 748-752].

These bonds were pertinent to Count Four and to Counts Twelve and Thirteen. The Government charged that the \$1795.30 was unreported income [Ex. 943-C].

3. Vending Machines.

In the fall of 1957 a competitive war in the placing of coin-operated cigarette vending machines broke out between two rival companies in Los Angeles: Coast Cigarette Vending Company and Rowe Service Company [R. T. 4203].

Fred Sica, a long-time friend of appellant, offered his assistance through Wm. Breen, a salesman for Coast, to Meyer Carr, president of Coast; and through the same channels was turned down [R. T. 4193-4196].

George Seedman, the president of Rowe, received the unsolicited assistance of Thomas A. Vaughn, the owner-operator of an allied cigarette vending machine company in New Orleans, Louisiana, the expenses for which Seedman eventually paid [Exs. 580-586]. Vaughn died before the trial and was unavailable as a witness [R. T. 4213]. Vaughn, Lou Angello, an aide of Vaughn's, Sica and appellant had a meeting at Harry Rudolph "Babe" McCoy's apartment [R. T. 5847-5848].

Fred Otash, a private detective, was hired by Coast to secure evidence as to the tactics and pressures being utilized by Rowe to obtain locations for machines.

Otash and his operatives made secret tape recordings of such activities. Otash by chance met Sica and appellant and discussed their relative roles in the vending machine war, at which time Otash told appellant he was working for Coast and appellant told Otash he was representing Rowe and was "trying to settle the dispute between Rowe and Coast." Otash then told appellant about the existence and contents of his secret tapes, which prompted appellant to ask if these tapes could be played for an official of Rowe. The following night at 3:00 a.m. Otash, appellant and Seedman met at Otash's office and played these tapes, at which time appellant cautioned Seedman, "You are getting yourself involved in a lot of trouble." Appellant told Otash that he would see that Otash was taken care of for helping him; and thereafter, Otash met appellant and Vaughn at appellant's request, at which time appellant told Vaughn, "I owe Otash some money, he has been very helpful to us; give me \$500." Vaughn handed appellant \$500.00 and appellant handed the money to Otash [R. T. 5837-5843]. Seedman reimbursed Vaughn the \$500.00 [Ex. 581].

On cross-examination of Otash, appellant was referred to as an intermediary by appellant's counsel, and Otash called appellant "an arbitrator" [R. T. 5844].

On November 27, 1957 Seedman cashed a \$5000.00 check, placed the cash in a plain envelope, gave the envelope to Vaughn, accompanied Vaughn to a pre-arranged luncheon meeting with Sica and appellant, saw Vaughn tender the envelope to appellant, and saw appellant pass the envelope to Sica while saying, "This money belongs to Fred Sica" [R. T. 5758-5762, 5767-5768; Ex. 580].

On December 11, 1957 appellant's intermediary obtained from Vaughn two checks payable to appellant and totaling \$3000.00; each of these checks bore the notation "loan"; and appellant cashed both checks [R.

T. 3534-3535; Exs. 597, 598]. Vaughn subsequently billed Seedman for the \$3000.00, and Seedman paid Vaughn this \$3000.00 at the same time he paid for Vaughn's other expenses in December 1957 [Exs. 582-585].

Immediately after these financial transactions, the vending machine war ended [R. T. 5841]. The Government charged that the \$3000.00 was unreported income [Ex. 943-C].

4. Other Income.

The relationship between appellant and W. C. Jones is set forth above. As was related above, appellant requested \$10,000 from Jones in February of 1957 for legal expenses, and Jones transmitted his check for \$1000.00 to Rexford Eagan, appellant's attorney at that time [Ex. 289]. Although appellant represented on February 20, 1957 that he needed money to pay Rexford Eagan, the facts were that the week before, February 13, 1957, appellant had paid Eagan \$2500 in cash, which was \$500 more than the total fee requested by Eagan (appellant at the time he paid the \$2500 expressed the thought that Eagan had not charged him enough) [R. T. 775, 776; 813-816; Ex. 629]. Appellant asked Eagan to substitute Jones' \$1000.00 check payable to Eagan for \$1000.00 cash of the \$2500.00 cash appellant had already paid; this was agreeable to Eagan; so Eagan went to the bank with appellant, endorsed and cashed Jones' check, and turned the \$1000.00 over to appellant. Jones was unaware of appellant's receipt of the cash proceeds of his check, and Jones was never repaid the \$1000.00 [R. T. 775, 776, 815].

The Government charged that the \$1000.00 was unreported income [Ex. 943-C].

Aubrey Stemler had numerous financial transactions with appellant, and they fall into three categories (1)

three loans totaling \$12,500.00, which were repaid [Exs. 238, 243, 244, 246-249]; (2) "life story" transactions totaling \$10,000.00 [Exs. 239-242, 251], see below; (3) a \$5000.00 "sales tax" transaction [Ex. 245]. This final \$5000.00 transaction is the one under consideration at this stage. This was the last transaction between appellant and Stemler and may be described as follows.

On the night of September 15, 1957 appellant sent Stemler a birthday gift (it was two days before his birthday) by a messenger accompanied by a letter [R. T. 1373-1375; Ex. 252]. The next day appellant went to Stemler's office and said that:

"he had a deal to sell his business, the greenhouse business, and it was then in escrow, and he had some accumulated unpaid State sales taxes and some labor bills that had to be paid to clear the escrow to make it so he could sell the business."
[R. T. 1375].

Appellant asked for \$5000.00; Stemler told him he needed the money in his own business; appellant then said, "I will have the money back in five or six days at the most" [R. T. 1375, 1376]; whereupon, Stemler gave appellant a \$5000.00 check to go into escrow [R. T. 1376; Ex. 245]. Within the hour Stemler's bank called and obtained authorization to cash the check for appellant. Immediately thereafter, appellant called Stemler and explained: "he cashed the check because it would be easier for him to clear the escrow using cash than it would be to have the check held for clearance"; and then appellant asked, "Can I get 15 more?" [R. T. 1376, 1377]. Stemler refused to give appellant any more [R. T. 1377].

The Greenhouse was in fact sold by appellant's sister to Joel Hamamoto on August 29, 1957, and there was an escrow involved in the sale. This escrow did not

require the seller to put in any money and none was in fact put in by the seller [R. T. 742; Ex. 179]. The California State Sales Tax Returns for the Greenhouse for the preceding eighteen months show that the sales tax for each quarter up to June 30, 1957 had been timely paid, and as of the time of the sale a closing return showing that as of August 31, 1957 the business was closed out and \$48.48 was the total amount of tax due and owing which was deducted from a \$50.00 cash deposit [Ex. 88A-F]. There were no known unpaid labor bills, and none were paid through the escrow [Ex. 179].

In the four months following this \$5000.00 transaction Stemler tried many times to get his money back, but to no avail; he never has been repaid any of this money [R. T. 1377, 1378].

The Government charged that the \$5000.00 was unreported income [Ex. 943-C].

5. Life Story Income.

In 1957 appellant received a total of \$32,500.00 which the Government charged as unreported income from transactions involving the proposed dramatic reproduction of appellant's life story, as follows:

Bernard Koomer	\$15,000.00
Aubrey V. Stemler	10,000.00
Leonard Krause	5,000.00
Charles Schneider	2,500.00
	<hr/>
	\$32,500.00 Total

Inasmuch as the entire amount of unreported income for 1958 as charged in Count Three was received from similar transactions, and in one instance from one of the same individuals involved in Count Two, this type of income will be set forth under Count Three.

D. Count Three.

Count Three of the Indictment charges that on July 15, 1959 appellant attempted to evade and defeat his income tax for 1958 by filing a false and fraudulent income tax return in which his income was listed as none and the tax due thereon was none; whereas, his income was \$33,350.00 and the tax due thereon was \$14,305.00.

Appellant was found guilty on this count.

In 1958 appellant received a total of \$56,200.00 from transactions involving the proposed dramatic reproduction of appellant's life story that was involved in the Government's charge of unreported income, as follows:

Leonard Krause	\$20,000.00
Louis Leitner	9,750.00
Max Feigenbaum	18,950.00
Joseph Bishop	7,500.00
	<hr/>
	\$56,200.00

As noted above, all the "life story" income and transactions of appellant will be discussed here for the sake of comprehension and brevity.

1. Owners, Authors and Producers.

The dramatic reproduction of appellant's life story begins with Henry Guttman, an interior decorator, restaurateur and professional actor. Guttman met appellant around 1947 and for the next several years had some business transactions with him [R. T. 2710]. In early 1951 Guttman loaned appellant \$2,000.00 pending the sale of appellant's bullet-proof Cadillac; the vehicle was sold, but Guttman didn't get his money [R. T. 2713, 2714]. On April 13, 1951 appellant granted Guttman a 90-day option to "dispose of the story of my life for motion picture, theater, television, radio, book form or any periodical rights," for which appellant

was to receive “50 percent of any amount (Guttman) will receive from any of the above royalties or direct sales” [R. T. 2763-2765; Ex. D].

On June 14, 1951 (during appellant’s prior income tax trial) appellant was paid \$1500.00 by Guttman as consideration for a contract signed that same day by both Guttman and appellant in the presence of their respective attorneys [R. T. 2715-2717; Ex. 182]. By this contract appellant sold his life story to Guttman. The contract specifically provides:

“1. The Seller [appellant] hereby gives, grants, bargains, sells, assigns, transfers and sets over forever to the Purchaser [Guttman] the absolute and unqualified rights to the story of his life, in whole or in part, in whatever manner said Purchaser may desire, including but not limited to the right to make and/or cause to be made literary, dramatic, speaking stage, motion picture, photoplay, television, radio and/or other adaptations of every kind and character of said story of his life or any part thereof” [R. T. 2757].

The contract also provides: That appellant is to assist in the preparation and writing of the life story; that each will get 50 percent of all moneys received; that appellant will repay Guttman for all advances from his share; that Guttman will pay costs from his share; and that Guttman has the right to assign this contract in whole or in part to anyone [Ex. 182].

On the same date, June 14, 1951, Guttman contracted with Irwin Gielgud, a writer, to write a movie version of appellant’s life story, for which Guttman paid \$1,000.00 and received a script entitled “Underworld Uncensored, or City in Chains” [R. T. 2712, 2737, 2738; Exs. 183, 615].

On June 20, 1951 appellant was convicted and remanded into the custody of the United States Marshal

(the prior trial), and did not get out of custody until October 9, 1955 [C. T. 519]. While appellant was in custody, Guttman advanced approximately \$5,000.00 to appellant and appellant's wife, and for six or seven months in 1956, after appellant was released and was on parole, Guttman advanced appellant \$100.00 per month [R. T. 2717, 2718, 2720-2723, 2732]. Guttman advanced appellant a total of \$9,000.00 on the basis of this contract [R. T. 2731, 2736].

Guttman tried many times to sell appellant's life story, but in vain; he never realized any money from it [R. T. 2719, 2749].

The contract between appellant and Guttman is still in full force and effect [R. T. 2724]; therefore, since 1951 appellant had no right, title or interest in his life story, but rather Guttman from that date on owns appellant's life story.

James A. Vaus, Jr. (the evangelist referred to above), met appellant around 1946 [R. T. 692], and ten years later he entered into a contract whereby he purchased appellant's life story [Ex. 255]. Vaus had personal experience in the field of exploitation of a life story as his own life story was published in a book written by him called "Why I Quit Syndicated Crime," which later was made into a motion picture; and Vaus and his assigns realized less than \$1,000 from the sale of the book and "not one penny" from the motion picture adaptation of the book [R. T. 692-695].

When appellant was paroled in October 1955, Vaus personally and through his charitable organizations began to render financial assistance to him which continued until April 16, 1957 when Vaus in a letter told appellant that he was through helping him because of the deceit of appellant concerning the trip to New York to privately confer with Billy Graham [Ex. 270]. The financial assistance given to appellant was known and

understood by both parties to be “an outright gift” [R. T. 712].

In the end of 1955 Vaus encouraged appellant to record some of the incidents of his (appellant’s) life for publication and if appellant could conclude such a record with a good ending it would make excellent material for a book or magazine article or motion picture [R. T. 718]. To further this thought, Vaus provided appellant with free secretarial assistance, and appellant began recording some incidents of his life [R. T. 718-721]. The final result of appellant’s labors in this direction was a manuscript of approximately 100 pages in length [Ex. 254].

Midway through the work on this manuscript, on March 15, 1956, Vaus and appellant entered into a contract whereby appellant, in essence, sold his entire life story to Vaus [R. T. 721-723; Ex. 255]. This contract in part provides:

“4. The owner [appellant] warrants and represents that the owner is the sole owner of all the rights, licenses, privileges and property herein conveyed and the unlimited world-wide motion picture rights in such work and has full and sole right and authority to convey said rights herein granted. . . . That no part of the motion picture rights to such work, or any of the other rights, licenses, privileges or property herein conveyed has in any way been encumbered, conveyed, granted, or otherwise disposed of and the same are free and clear of any liens or claims whatsoever in favor of any part whomsoever and said rights, and the full right to exercise the same, have not been impaired; . . .”

“The foregoing warranties and representations are made by the owner to induce the purchaser to

execute this agreement, and the owner acknowledges and concedes that the purchaser has executed this agreement in reliance thereon." [Ex. 255, pp. 3, 4.]

Vaus never heard of Guttman, and knew nothing of Guttman's contract with appellant; yet, at the very time appellant signed the Vaus contract he was receiving \$100.00 each month from Guttman as an advance from Guttman to be applied to Guttman's life story contract with appellant [R. T. 723, 2734]. Guttman never heard of Vaus either [R. T. 2724].

On September 8, 1956 Vaus and appellant executed a "Mutual Release in Full," whereby their contract of March 15, 1956 was nullified [R. T. 724-726; Ex. 258].

Larry Harmon, a man with 25 years' experience in the entertainment industry, came in contact with appellant's life story through Eleanor Churchin in mid-1956; and, although he had never produced a motion picture, he became interested in producing a picture based on appellant's life story [R. T. 6373-6375]. Harmon tried to arrange: a contract with appellant, the financing of the picture, a financial settlement of appellant's back taxes with the Government, and the selection of technical personnel for the picture [R. T. 6375]. Harmon was unsuccessful in all of his endeavors in this regard [R. T. 6375-6413]. Harmon and appellant did meet with Internal Revenue Service officials in mid-1956 to try to arrange a means to produce the picture that would be a satisfactory method of paying appellant's back taxes; the Government personnel were ready and willing to proceed with some equitable arrangement [R. T. 6377-6381, 6397-6399]. Harmon never had a budget, a script (other than Exhibit 254), actors, nor a written contract; all he had was an idea [R. T. 6381-6383].

On direct examination Harmon testified that he had discussions with appellant relating to a contract between them to produce the motion picture and, based on these conversations, Harmon had a contract drawn up and submitted it to appellant; it was never executed or returned, and Harmon could not locate his copy of this proposed contract [R. T. 6375, 6382, 6383]. On cross-examination Harmon's proposed contract was produced [R. T. 6393; Ex. M]. This proposed contract provides in part:

“Whereas [appellant], is the sole owner of all rights in and to any story or stories heretofore written or any story or stories which may hereafter be written based upon the life of said [appellant] . . .

“[Appellant] represents and warrants to Harmon that (a) [appellant] has full warrant and authority to grant the right herein conveyed and such rights have in no way been conveyed, granted, mortgaged or encumbered or otherwise disposed of to or in favor of any third party.

* * *

“No motion picture has been made based upon the story or any part thereof, no right, license, or privilege so to do has heretofore been granted to anyone. Neither the story nor any play or dramatic adaptation based upon it or any part of it has been produced . . . and no rights, license, or privilege so to do has heretofore been granted to anyone” [R. T. 6401, 6402; Ex. M].

Harmon testified that clauses such as those quoted above were discussed with appellant, and were never contradicted or changed [R. T. 6402, 6403, 6410-6412]. Harmon did not know of any other interests in appellant's life story (other than Vaus' interest which he

knew was released) ; and Harmon did not know of Guttman (who was still advancing appellant \$100.00 per month when Harmon became involved in appellant's life story [R. T. 6384-6387]).

Ben Hecht, an author, who had met appellant in the late 1940's, was given, in mid-1957, a copy of the manuscript prepared by appellant with the aid of Vaus [Ex. 254] to read. He read it, met with appellant, and it was decided that Hecht would write a book based upon appellant's life story, and any proceeds realized from such a book would be split 50-50 [R. T. 2300-2305]. Hecht received a \$2,500.00 advance from his publisher to write this book, and about a year later he returned the advance when the *Saturday Evening Post* published a series of four articles about appellant (with appellant's cooperation) [R. T. 2317-2319]. When Hecht commenced upon this project he had no knowledge of anyone else having any type of interest in appellant's life story, nor did he know that appellant had already raised money on his life story and continued to raise money on this project [R. T. 2310].

In mid-1958 Dean Jennings, the author of the series on appellant that appeared in the fall of 1958 in the *Saturday Evening Post*, conferred with appellant and also conferred with Hecht, and Hecht first became aware of appellant's activities in raising funds based upon the life story [R. T. 2335-2337]. Hecht confronted appellant with this fact:

"I said to Mr. Cohen that Jennings had called up, and that Jennings was no friend of his, and that he had got me angry because he said to me that Mr. Cohen was out selling stocks, or bonds, or equities in this contract with the monies, and I said it couldn't be true, not that I couldn't imagine Mr. Cohen doing something like that, but I couldn't imagine anybody being stupid enough to

buy an equity in a non-existent, non-extant piece of work. I didn't know what kind of people would buy that. They had no contracts with anyone, they had no manuscript, they had no script, and I didn't believe it was true. This I told to Mr. Cohen.

Q. (By the prosecutor) What did Mr. Cohen say when you told that to him? A. (By Hecht) Nothing on that subject.

Q. Nothing? A. No.

Q. Did he admit or deny that he had received any money or having any connection with his life story? A. I didn't ask him the question. I didn't ask him from a questioning point of view. I just told him these things to wait to see what he would say. He didn't admit or deny, just went on talking about Jennings. May I say that I understood what the silence was." [R. T. 2336-2337].

Hecht, who by his own admissions is not a rapid writer, eventually wrote 85 typewritten pages [Ex. 433], and incorporated therein, word for word, are at least 25 pages of the manuscript [Ex. 254] that Hecht was given in the beginning [R. T. 2312-2315]. According to Hecht's testimony in May of 1961, the 85 pages (which is his total output on this book) were "with lots of luck and solvency on (his) part," a year to a year and one-half from publication [R. T. 2315]. Hecht has never realized any money on this project [R. T. 2338].

Dean Jennings, an author who has specialized in writing other people's life stories conferred with appellant in December of 1957 at which time they had the following conversation:

"I asked him if he was committed to anyone for his first person story, which is what I wanted at

that time. He said that he had been talking to another newspaperman about it and he gave me a figure that he said the other newspaperman would pay for the story.

Q. (By the prosecutor) Did he identify this other newspaperman? A. Yes, his name was Joe Hyams of the New York Herald-Tribune.

Q. Did he state the figure that he was dealing for with Mr. Joe Hyams? A. He said Mr. Hyams had promised, or at least had said he thought he could get \$25,000.00.

* * * * *

“I said I didn’t think that he would get \$25,000.00.”

Appellant then offered his life story to Jennings for \$30,000.00 and gave Jennings a copy of the manuscript he had dictated with Vaus’ help [Ex. 254]. The *Saturday Evening Post*, *Life* and *Look* rejected this manuscript [Ex. 254], and it was returned to appellant [R. T. 5705-5709].

In April of 1958 Jennings and appellant met, and appellant consented to Jennings’ writing a third person story about appellant for the *Saturday Evening Post*, for which appellant would receive no money [R. T. 5716, 5717]. Jennings started working and about a month later appellant asked for \$15,000.00, and stated that if he gets the money it would have to be paid to a third party or the Government would get it; Jennings submitted the request to the magazine and it was turned down [R. T. 5717-5720].

In late 1958, after Jennings’ articles were published, appellant, who stated that he was dissatisfied with what Hecht had written, asked Jennings to write a book about appellant, and the proceeds for appellant to be derived therefrom would be paid to a third person so

the Government wouldn't get it. Jennings did not contract to write the book [R. T. 5720-5724].

Mr. Jennings never heard of Henry Guttman [R. T. 5741].

Joseph E. Seide, a public relations and management man, met appellant in the summer of 1960 and discussed the sale of appellant's life story to a motion picture studio for which Seide was to get a percentage of the net profits [R. T. 3355-3359]. Seide was to sell the story that Hecht was writing to a motion picture studio on a sale-leaseback agreement (which Seide explained) [R. T. 5359-5363]. Hecht had not yet written a book [R. T. 5363, 5369, 5372]. Seide and appellant entered into a written agreement dated July 11, 1960 in which appellant authorized Seide to represent appellant for 30 days in the "sales and promotion of a picture" relating to appellant's life story and Seide would get 2% of the proceeds of the film [Ex. 398]. Seide was unsuccessful as he had no story [R. T. 5372].

Appellant was represented by an attorney in these transactions with Seide [R. T. 5355-5369, 5377]. Appellant never advised Seide if anyone else had any interest of any type in appellant's life story. Seide never heard of Henry Guttman [R. T. 5378].

According to appellant's testimony, appellant in the spring of 1961 signed a contract with a publisher to publish a book about his life story; Joe Hyams (misspelled in transcript) was contacted to write this book, and Hyams received a \$7,500.00 advance out of which appellant received \$2,500.00 [R. T. 7153-7155].

This completes the outline of those who were involved in appellant's life story as owners or authors or publicists.

<u>Name</u>	<u>Function</u>	<u>Time Span</u>	<u>Date of Contract</u>
Guttman	Owner	Feb. 1951 to date	June 14, 1951
Gielgud	Author	June 1951 to Dec. 1951	June 14, 1951 (with Guttman)
Vaus	Owner	Nov. 1955 to Sept. 1956	March 15, 1956
Harmon	Producer	July 1956 to June 1957	April 1957 (unexecuted)
Hecht	Author	June 1957 to date	(None in writing)
Jennings	Author	Dec. 1957 to Nov. 1958	(None in writing)
Seide	Publicist	June 1960 to Aug. 1960	July 11, 1960
Hyams	Author	Dec. 1957 to date	March 1961

2. Financiers.

We shall now discuss those people who transferred or were asked to transfer money to appellant on the basis of appellant's life story. In this regard, appellee has summarized the evidence of such transfers in Exhibits 1 to 10 contained in the Appendix to this brief.

There are some generalities that are applicable to each of these transferors. Each of them dealt personally with appellant. All but Charles Schneider had a "life story contract" of some kind. Not one of them knew about Guttman or his contract with appellant; not one of them had any knowledge about the others (except perhaps Bieber). There is no mathematical consistency between the amount of money appellant received from each of these persons and the "interest" in his life story that they received. Fisher got 5% on a \$7,500.00 contract for which she paid \$7,537.27; Bieber

got 5% on a \$10,500.00 contract for which he paid \$10,500.00; Stemler got 10% on a \$10,000.00 contract for which he paid \$10,000.00; Koomer got 10% on a \$15,000.00 contract for which he paid \$15,000.00; Krause got a total of 10% on two contracts totaling \$25,000.00 for which he paid \$25,000.00; Leitner got 10% on a \$35,000.00 contract for which he paid \$9,750.00; Feigenbaum got 10% on a \$25,000.00 contract for which he paid \$18,950.00; Bishop got 2% on a \$7,500.00 contract for which he paid \$7,500.00; Fortwangler turned down 3% on a \$15,000.00 contract; and Stark turned down 8% on a \$30,000.00 contract.

Fisher, Bieber, Koomer, Krause, Leitner, Feigenbaum, Bishop and Fortwangler have identical “life story agreements” and “promissory notes” except for date, amount of money, percentage, and their own names.

Stemler’s contract with appellant stands alone and is quite different from the others. Schneider did not get a contract. The contract offered to Stark is different from any of the others; so there are three types of contracts involved.

The dates in these contracts do not conform to the facts stated in the very same contract.

Appellant received a total of \$106,737.27 from these “life story” transactions, none of which was paid back, although there were many demands.

Ruth Fisher (Benson), a middle-aged woman florist, writer and cleaner, and the same woman who along with her brother Harmon Eldridge started Michael’s Greenhouses, Inc., met appellant in late 1955 [R. T. 235-240]. In January of 1956 her brother loaned appellant \$500 [Ex. 91]. In the period between August of 1957 and September 1958 Fisher transferred \$7,037.27 to appellant. Fisher received a promissory note from appellant that is dated March 5, 1958 and was notarized on May 16, 1958, and this note provides:

“PROMISSORY NOTE

March 5th, 1958

“\$7500.00

“Five years after date, I promise to pay to the order of RUTH L. FISHER the sum of SEVENTY-FIVE HUNDRED (\$7500.00) DOLLARS without interest until maturity and at the rate of seven per cent (7%) per annum after maturity, at 129 South Berendo Street, Los Angeles 4, California, or at such bank or other place in the City of Los Angeles, California, as the holder of this note may hereafter appoint.

/s/ MICHAEL-MICKEY-COHEN

“State of California, County of Los Angeles—ss.

Subscribed and sworn to before me, a notary public, this 16th day of May, 1958.

/s/ EDNA R. RUBY,
Notary Public.

My Commission Expires February 28, 1960”.
[Ex. 100].

Fisher also received a “life story agreement” along with the above-set forth Note which is also dated March 5, 1958 and was notarized on May 16, 1958, and this contract provides:

“KNOW ALL MEN BY THESE PRESENTS, That whereas I, the undersigned have had discussions with certain persons concerning the possibility of having a book written based upon my life, and

“WHEREAS if such book is written it is also possible that sundry commercial ramifications of said book such as legitimate plays, motion pictures, television productions and other publications may develop or enure, and

“WHEREAS if such book or other publications are adapted commercially I will be entitled to receive certain monetary benefits for the use of my name and the information and assistance that I have furnished and will furnish to such author and publisher, and

“WHEREAS you, RUTH L. FISHER, have hereto advanced to me the sum of \$7500.00 which loan is evidenced by my note of even date herewith due five years after date made payable to your order, and

“WHEREAS at the present time I have no funds with which to repay said note or any part thereof, but anticipate that the commercial publications based upon my life as aforesaid will produce a sum adequate to reimburse you for said advancement, and

“WHEREAS in the event that said book is published and other publications are completed, certain portions of the proceeds therefrom will be retained by the publishers and authors of said book and by agents and producers of said other publications hereinafter described. After said retentions and deductions certain sums would accrue to me or for my benefit by virtue of agreements, contracts, royalties, advancements and other payments resulting from any and all the aforesaid publications based upon my life (hereinafter sometime referred to as “my residue”)

“NOW THEREFORE, in consideration of your advancement to me of the aforesaid sum of \$7500.00, the receipt and sufficiency whereof is hereby acknowledged, and your granting to me time to repay said sum as is evidenced by said note, I do hereby grant, sell, assign, transfer and set over unto you RUTH L. FISHER, your execu-

tors, administrators and assigns to you and their own proper use and benefit, five per cent (5%) of my residue of any and all contracts, agreements, payments, royalties, rights to receive money, monies, or moneys worth, which may hereafter become due to me. It is understood that the monies received by you from your participating 5% interest in my residue shall be first applied against the aforementioned loan of \$7500.00 until the same is full repaid, but that thereafter any additional sums which may be received by reason of said 5% participating interest in my residue as a result of the aforesaid publications shall be and belong to you absolutely and without reservation. Except for the application of the proceeds of such participating interest to the liquidation of my note as aforesaid, you have no duty or obligation whatsoever to account to me or anyone in my behalf.

“I do hereby give you RUTH L. FISHER, your executors, administrators and assigns the full power and authority for your own use and benefit but at your own cost to take all legal measures which may be proper or necessary for the complete recovery of the above described monies, property and choses in action or any portion or portions and in your name or otherwise, to prosecute and withdraw any suits or proceedings at law or in equity required or desired by you to enforce the provisions hereof.

“IN WITNESS WHEREOF, I have hereinafter set my hand and seal at Los Angeles, California, this 5th day of March, 1958.

/s/ MICHAEL-MICKEY-COHEN

(Seal)

“SIGNED IN THE PRESENCE OF:

/s/ DOROTHY BURNETT.

“State of California, County of Los Angeles—ss.

Subscribed and sworn to before me, a notary public, this 16th day of May, 1958.

/s/ EDNA R. RUBY,
Notary Public.

My Commission Expires February 28, 1960”.
[Ex. 101].

After the date on the note and contract, March 5, 1958, appellant received from Fisher \$4,037.27 on the note and contract [Exs. 95, 97, 102].

Fisher testified that she never asked for the note and contract; that she received an interest in a motion picture; that she didn't know anyone else had an interest; and that she would have loaned appellant the money without the note and contract [R. T. 313, 344, 360, 370].

George Bieber, a practicing attorney at law for 35 years in Chicago, Illinois and a friend of appellant's for over 20 years, had numerous financial transactions with appellant in 1957 and 1958; Bieber transferred \$64,000.00 to appellant and was repaid \$42,500.00 during this period, and the largest outstanding balance appellant owed Bieber at any one time was \$22,500.00. Appellant still owes him \$21,500.00 [Ex. 170-C; R. T. 2029-2069]. Bieber received a promissory note for \$10,500.00 and a life story contract in the same amount dated February 3, 1958 and notarized February 11, 1958; Bieber did not loan appellant money on the basis of appellant's life story and did not ask for or expect the note and contract [R. T. 2074-2076; Exs. 430, 431].

Between January 20, 1958 and February 17, 1958 appellant only owed Bieber \$5,500.00 [R. T. 2136; Ex. 170-C].

Bieber's life story money and Fisher's life story money were not charged to appellant as income in the year received.

Charles Schneider, the tree surgeon referred to above, handed appellant a \$2,500.00 check dated April 10, 1957, upon which Barney Peller wrote the notation, "Loan made to Michael Mickey Cohen for future deal on motion picture of the life story of Michael Cohen" [Ex. 272]. When appellant met Schneider in Cincinnati, Ohio in April of 1957 he told him that he was writing a book about himself called the "Poison Has Left Me" which he thought would be a very successful book and could be a successful motion picture; appellant, with an assist from Barney Peller, asked Schneider for money for his book and Schneider was to get back a portion of the picture [R. T. 826, 833-834]. Schneider did not get a promissory note and life story contract [R. T. 834]. Schneider knew of no other investments or loans or transfers relating to appellant's life story [R. T. 835-836].

Aubrey Stemler, a vending machine representative for 25 years (and the same Stemler referred to above under Count Two), met appellant in 1956 [R. T. 1349-1351]. During the same period of time Stemler was having other financial transactions with appellant, he gave appellant four checks totaling \$10,000.00, and each check bears a notation relating to appellant's life story. These notations use the words "investment" and "purchase" in relation to appellant's life story [Exs. 239-242]. Stemler purchased from appellant a 10% interest in the motion picture, "The Life of Mickey Cohen," for \$10,000.00 [R. T. 1360, 1388]. Appellant brought the manuscript he had made with Vaus' aid [Ex. 254] to Stemler's home and let Stemler and his

wife read it; thereafter he offered to sell to Stemler 10% interest for \$10,000.00 [R. T. 1361]. Stemler did not know of anyone else having any type of interest in appellant's life story [R. T. 1364]. On May 31, 1957, two weeks after Stemler made the last payment to appellant on his purchase of a 10% interest, Stemler, in appellant's presence, typed up an agreement and appellant signed it [R. T. 1364-1366; Ex. 251]. This contract provides:

“May 31st 1957

“Mr. Aubrey Stemler
2321 West Pico Blvd.
Los Angeles, Calif.

“Dear Sir:

“I the undersigned Michael Cohen (Mickey Cohen) does hereby assign ten per cent of all monies or other valuable considerations accruing to my credit from the sale or production of the motion picture to be made of my life and tentatively called The Mickey Cohen Story.

“This assignment is given you in return for the payment of four checks totalling \$10,000.00 the receipt of which is hereby acknowledged.

“These four checks are listed as follows: No. 2500 dated April 23rd 1957, No. 2495 dated May 7th 1957, No. 2496 dated May 15th 1957, No. 2497 dated May 15th 1957.

“It is further understood that should this motion picture not be in production within one year from date the above mentioned amount \$10,000.00 is to be returned at your option with interest of 6% from the date shown above.

“Very truly yours,

/s/ Michael-Mickey-Cohen,
Michael Cohen.”

[Ex. 251].

Stemler has never been repaid even a dime of this \$10,000.00 [R. T. 1382].

Bernard Koomer, a cafe owner, met appellant in April 1957 [R. T. 2384]. On May 12, 1957 the Koomers met with appellant at appellant's request. Appellant told them: that his life story was about to be filmed; it would make money; he needed somebody to invest in it or the Government would get the half-million dollars in back taxes he owed and asked Koomers for \$15,000.00 for 10% of the picture. Appellant also told them: Billy Graham was interested in the film and would endorse it; that appellant had an offer for \$150,000.00 for the screen play from a studio. Appellant let the Koomers read the manuscript he prepared with Vaus' aid [Ex. 254; R. T. 2396-2402]. The parties met again the next day at a restaurant and the offer was repeated; the following day Koomer turned down the offer; appellant became abusive, then wanted a check in exchange for a ring [R. T. 2402-2406]. The parties met, and Koomer gave appellant two checks totaling \$10,000.00, and at 2:00 a.m. the next day appellant gave Koomer a large diamond ring [Ex. 681; R. T. 2407-2411]. Later that day the ring transaction fell through because Koomer didn't want to go through with it and stopped payment on the checks; appellant became angry; they met later that day, and appellant snatched the ring from Koomer's hand, tore up Koomer's checks, and threw them in his face [R. T. 2411-2414]. That evening appellant went by Koomer's cafe and in an abusive and insulting manner threw a \$10 bill at Koomer, which was returned to appellant [R. T. 2414-2416]. Koomer and his wife then received anonymous threatening telephone calls and were told to get in touch with appellant; twice that same day they telephoned appellant who was in New York and New Jersey and told him of the calls and that there was a misunderstanding and that they didn't want any prob-

lems [R. T. 2416-2420, 2459-2461]. That same night Koomer's wife wrote appellant a letter and Koomer enclosed a \$7,500.00 check that was backdated to May 6, 1957 and bore the notation, "Advance on \$15,000. loan to Michael Cohen for 10% of future story and motion picture rights to the Mickey Cohen Story" [Exs. 319, 322; R. T. 2421-2422]. Several days thereafter appellant returned from New York and met with Koomer who told him that he was sorry if there was any misunderstanding but that he was afraid of being involved with appellant; they discussed the \$7,500.00 investment, and appellant said if Koomer ever needed the money he could always get it [R. T. 2422-2423].

On July 24, 1957 appellant got an additional \$7,500.00 check from Koomer which bears the notation, "Final payment for 10% for All Rights to the Mickey Choen (*sic*) Story" [Ex. 320]. Koomer had been asking appellant for documentation of their transaction, and was told that he would get documents when he paid a total of \$15,000.00 [R. T. 2428-2430]. After July of 1957 Koomer frequently tried to get his money back from appellant and he also tried to get documentation of the whole transaction; and eight months later, on March 31, 1958, Koomer got a promissory note and life story contract [R. T. 2430-2433].

The Koomers never received any of the \$15,000.00 back although they tried to get it from appellant on more than one occasion [R. T. 2433].

Leonard S. Krause, M.D., a practicing psychiatrist for 15 years, met appellant in October of 1957 [R. T. 1165, 1177]. Krause had numerous transactions with appellant, some of which were conducted in the names of David Krause and Sadelle Bellows, the brother and sister of Dr. Krause [R. T. 1181, 1182, 1185]. In the period between November of 1957 and March of 1958 Krause gave appellant checks totaling \$56,000.00,

and of this amount \$13,000.00 in checks never cleared the bank accounts; an additional \$18,000 in checks were accommodation checks (appellant paid for them); and the balance of \$25,000.00 was applied on the life story [R. T. 1165-1172; Exs. 327-344]. Appellant, in October of 1957, told Krause that he (appellant) was in the process of settling some difference with the Government in connection with some former income tax liability, and in order to do this if he could get moving on the book and movie it would aid his cause considerably—so could he have \$25,000.00 [R. T. 1181-1201]. Appellant also told Krause that the Government was interested in producing the movie and the book and that they were going to get a certain cut and the rest would be sufficient to take care of all people around him; appellant also said that the movie was on the verge of production [R. T. 1201-1202]. Krause paid appellant \$25,000.00 over the next four months [R. T. 1188, 1189; Exs. 327-344]. Krause was utilizing his sister's and his brother's names in dealing with appellant and so received two notes and two life story contracts as follows: A promissory note for \$10,000.00 and a contract in the same amount granting a 4% interest, both in the name of David Krause and both dated February 3, 1958; a promissory note for \$15,000.00 and a contract in the same amount granting a 6% interest, both in the name of Sadelle Bellows, and both dated February 3, 1958 and both notarized on February 11, 1958 [Exs. 257-260]. Krause borrowed money to pay appellant and so explained to appellant, who told him he only needed it for temporary purposes and would get the money back for Krause whenever he needed it [R. T. 1188, 1191, 1199-1200]. Krause needed the money back and tried to get it from appellant on numerous occasions but without success [R. T. 1192, 1198]. Krause was very dissatisfied with the notes and contracts he received from appellant so he

obtained legal advice and tried to have appellant make the necessary changes [R. T. 1199; Exs. 351-356]. On May 27, 1958 Krause and his sister met appellant, appellant's sister and appellant's nephew, at which time Krause tried to tell appellant's sister about the \$25,000.00 in financial transactions and to get her to agree to accept the responsibility of repayment if anything happened to appellant; appellant interrupted, became irritated, violent, vituperative, and coarse, picked up a chair and threatened to hit Krause, and was restrained by two women and a boy; Krause left shortly thereafter without obtaining any satisfaction [R. T. 1192-1197; Ex. 353]. Krause had no knowledge of any other people having any type of interest in appellant's life story [R. T. 1287]. Krause has not been repaid any of his \$25,000 [R. T. 1197, 1198].

Louis Leitner, a married man with three children who earns his livelihood driving a beer truck and makes less than \$10,000 a year doing it, knew appellant when they were both "kids," and then for 26 years he did not see appellant [R. T. 1891-1896]. Then, in December 1957, appellant ran into Leitner in a cafe. Appellant wanted to see Leitner's family and he was invited to do so [R. T. 1897]. Appellant went to Leitner's home; they reminisced for awhile; then appellant told Leitner that he was a pauper, that he was broke, that he had an opportunity to make some money to clear himself with the Government, and that he had an opportunity to go straight [R. T. 1898-1899]. Appellant then asked Leitner for \$3,000.00 as he was trying to get Ben Hecht some money and he needed money bad, and Leitner gave him a check for \$1,500.00 dated January 20, 1958, which was negotiated by appellant nine days later; this check bears the notation, "as a personal loan," which Leitner wrote on the check at appellant's request, and appellant explained that he wanted it on the check because he knew Leitner had to

work hard for his money and that he had a family [R. T. 1908-1911; Ex. 370]. Appellant also told Leitner that if he needed the money back that appellant would borrow it for him and would repay Leitner; appellant told Leitner, "any time you want your money back I will give it to you on demand" [R. T. 1911-1913]. About a week later appellant asked Leitner for more money, and Leitner gave him a \$2,000.00 check dated January 28, 1958, which was negotiated by appellant the next day along with the earlier check for \$1,500.00 [R. T. 1914-1915; Ex. 371]. On the same date appellant cashed the two prior checks, January 29, 1958, he obtained three more checks from Leitner totaling \$3,250 (one of which was postdated) [R. T. 1916-1921; Exs. 372-374].

It must be noted that the same day Leitner gave appellant the first check, January 20, 1958, on appellant's representations that he was broke, appellant cashed a \$7,500.00 check he got from Billy Gray and appellant received \$1,000.00 in currency from Michael Kasino [Ex. 945]. Also during the period of January 21, 1958 to January 29, 1958 appellant cashed \$11,000.00 in checks from Michael Kasino [Ex. 945].

The three checks appellant received from Leitner on January 29, 1958 appellant cashed on February 3, 1958 in Chicago, Illinois with the help of Attorney George Bieber [Exs. 372-374].

Appellant, in April of 1958, asked Leitner for more money, and Leitner mortgaged his home and gave appellant two checks totaling \$3,000.00 (one is postdated) [R. T. 1922-1923; Exs. 375, 376]. Leitner obtained the money to cover his checks to appellant by borrowing from a bank, borrowing from his brother, taking money out of his savings account, cashing in bonds, and mortgaging his home. Leitner's checks total \$9,750.00 [R. T. 1924, 1925].

Before Leitner had given appellant the last two checks in April of 1958, appellant came to Leitner and gave him a promissory note for \$35,000.00 and a life story agreement in the same amount; both these documents are dated February 3, 1958 and were notarized on February 11, 1958; appellant told Leitner that he was giving him these documents as insurance that he would get his money back, and appellant tried to get more money from Leitner but got just \$3,000.00 more [R. T. 1926-1933; Exs. 379, 380]. Leitner only transferred \$9,750.00 to appellant and never received any of it back although he tried to get it back [R. T. 1940-1943].

Leitner had no knowledge about the interests of other people in appellant's life story [R. T. 1945]. However, in March of 1961, after the indictment and just before trial, appellant contacted Leitner and showed him a contract from a publishing company [R. T. 1945-1947].

Michael Kasino, a 21-year-old press agent, company manager, and producer of one-night stands, along with two business partners, needed \$15,000.00 in December of 1957 to finance a Johnny Mathis road show; appellant's name was mentioned by a secretary as a possible source of money. They met with appellant; a few days later appellant handed them a \$15,000.00 check of Max Feigenbaum; they promised in writing to return the \$15,000.00 with 10% interest on January 21, 1958. The tour took place, it lost money, and Kasino and his partners repaid appellant a total of \$16,950.00 between January 20, 1958 and April 28, 1958 [R. T. 1618-1642, 1648-1666; Exs. 73, 77, 383, 385, 386, 391-393, 396, 397]. Feigenbaum was not advised that the money was repaid to appellant [R. T. 1666-1673].

Max Feigenbaum, a 70-year-old shoe wholesaler from Nashville, Tennessee, came to California in 1957 to visit his children, and met appellant [R. T. 1541-1545].

On appellant's recommendation, Feigenbaum gave his check for \$15,000.00 for the Mathis tour; Feigenbaum had never heard of Johnny Mathis, a singer [R. T. 1551-1552]. Feigenbaum depended upon appellant to see that he got his money back [R. T. 1553]. After paying his money, Feigenbaum returned to Nashville where he was ill and hospitalized and eventually in early 1958 obtained \$1,000 from appellant [R. T. 1609]. Feigenbaum in 1958 had numerous conversations with appellant in Los Angeles, California and in Nashville, Tennessee, and appellant never told Feigenbaum that he had collected the \$15,000.00, plus \$1,950.00 in interest; in fact it was not until April of 1960 that Feigenbaum learned of appellant's receipt of the \$16,950.00, and even then he did not find out from appellant [R. T. 1610-1611].

In June of 1958 appellant went to Nashville, Tennessee with his attorney, Jack A. Dahlstrum, and met with Feigenbaum; while in Nashville appellant told Feigenbaum that if he collected anything from Kasino (who had already paid appellant) he would invest it for Feigenbaum in his (appellant's) life story, and this was agreeable to Feigenbaum [R. T. 1572-1603, 1608-1610]. Appellant, at that time, also asked Feigenbaum for \$10,000.00; Feigenbaum said he didn't have it but gave him a check for \$3,000.00 while telling him that the check was no good but appellant could make it good; shortly thereafter appellant telephoned Feigenbaum and said he was in a bad fix and needed money and could Feigenbaum help him; Feigenbaum sent him a \$3,000.00 Cashier's check [R. T. 1562-1567; Ex. 397].

Feigenbaum received a life story contract which recites that Feigenbaum had advanced \$25,000.00 to appellant and thereby got a 10% interest; this contract is dated March 7, 1958, and notarized March 7, 1958 [R. T. 1564-1567; Ex. 396].

Joseph Bishop, a personal manager and a business manager for Ben Blue, and formerly in the production side of motion pictures, met appellant in early 1958 [R. T. 1406-1409]. On April 6, 1958 appellant borrowed \$800.00 from Bishop [R. T. 1409, 1410; Ex. 362]. On May 26, 1958 appellant obtained \$6,000.00 from Bishop on the representation that a book was being written about him and he needed the money and would repay it in about 90 days; Bishop made his check payable to appellant's sister at appellant's request [R. T. 1409-1413; Ex. 363]. On June 2, 1958, June 15, 1958 and August 21, 1958 Bishop made out three checks that were cashed and total \$1,200.00, out of which appellant received \$700.00 in currency [R. T. 1413-1417; Exs. 364-366]. Bishop transferred a total of \$7,500.00 to appellant.

Bishop received from appellant a promissory note for \$7,500.00 and a life story contract in the same amount and giving him a 2% interest; both these documents are dated September 17, 1958 [R. T. 1417-1421; Exs. 367, 368]. Bishop had requested repayment of the money he transferred to appellant, and appellant advised he couldn't pay it; so appellant gave Bishop the note and the contract to protect him [R. T. 1421-1423].

Appellant and Bishop had discussed appellant's life story at the time of the \$6,000.00 check; appellant had told him that there were producers interested in doing the book about appellant as a movie; and appellant was then told about Bishop's prior work on movies to which appellant responded that Bishop might be utilized on the production of the movie when the time comes; appellant also told Bishop that Hecht was having trouble with the last couple of chapters as he couldn't find an ending [R. T. 1423-1425].

Bishop had no knowledge of any other persons having any type of interest in appellant's life story [R. T.

1424-1425]. Bishop tried to collect his money back, but he was unsuccessful [R. T. 1430].

In September of 1958 appellant attempted to obtain money from Louis A. Fortwangler, 74-year-old retired businessman from Ohio. Fortwangler made a trip to California with Barney Peller; met appellant; appellant requested Fortwangler to go into business with him on appellant's life story, that he (appellant) couldn't have any money, and that they would make a lot of money. Appellant asked Fortwangler for \$15,000.00; he did not get it; appellant sent Fortwangler an unsigned promissory note and life story contract offering 3%; it was not consummated [R. T. 1448-1474; Exs. 400-406].

In May of 1959 appellant attempted to obtain money from Mr. and Mrs. Eugene Stark, restaurant operators in Los Angeles, California; appellant offered to sell the Starks an interest in the picture and the book that was being written about him; appellant, on a subsequent meeting, handed Mr. Stark a \$30,000.00 promissory note and a life story contract (unlike any of those mentioned above) for 8% and again asked Stark to buy a percentage of the picture. The Starks turned the deal down [R. T. 2652-2668; Exs. 407, 408]. Appellant had told Stark that Columbia Pictures was interested in appellant's life story; appellant did not tell Stark about anyone else having any interest in his life story [R. T. 2667-2668].

This presentation covers the financial transactions directly involved with appellant's life story; however, there were other transactions with other persons that touched upon appellant and his life story that are not directly pertinent to income, but do go to representations made by appellant on this subject, *e.g.*, Ruth Allen, Samuel Brody, David Fertig, Gilbert Kitt, Lester Beckman, Jordan Freidman, Billy Gray and government

representatives, to name a few. Appellant also contacted entertainment stars, such as Red Skelton and Jerry Lewis regarding the portrayal of his life story.

It was never ascertained what attorney or attorneys drafted the several promissory notes and life story contracts, although it was established that some were typed and mailed from George Bieber's office [R. T. 1980-1988]. Appellant himself was unable to recollect what attorney or attorneys drafted these documents [R. T. 7356-7358].

It must be noted that appellant told Dean Jennings that so far as the life story contracts ever being repaid, appellant had protected himself in the contracts so that if there were no movie or no book appellant would not have to repay the money he received [R. T. 5736].

A book on appellant's life story has not been published. A motion picture on appellant's life story has not been made.

E. Count Four.

Count Four of the Indictment charges that from October 10, 1955 until September 16, 1960 appellant attempted to evade and defeat the payment of income taxes then due, owing and duly assessed against him in the total amount of \$135,847.94 by wilfully failing to pay said taxes and by wilfully and knowingly misrepresenting to and concealing from the United States of America the true state of his financial affairs in that he (1) denied to agents of the Internal Revenue Service that he had any assets; (2) placed and caused to be placed his assets in the names of other persons; (3) deposited his assets with other persons; (4) dealt in currency; (5) caused his obligations to be paid through and in the names of other persons; (6) caused

monies paid to him to be paid through and in the names of other persons; and (7) paid and caused to be paid his creditors, other than the United States of America.

Appellant was found guilty on this count.

Appellant had filed individual income tax returns for the calendar years 1945, 1946 and 1947 and appellant and his wife, La Vonne, filed joint income tax returns for the calendar years 1948, 1949 and 1950 [Ex. 5].

On June 20, 1951 appellant was found guilty by a jury of four counts: three counts of wilful attempt to evade and defeat income taxes for the calendar years 1946, 1947 and 1948, in violation of 26 U. S. C. 145(b); and one count of making a false statement to a Government agency, the Internal Revenue Service, in violation of 18 U. S. C. 1001; appellant was sentenced on July 9, 1951 to a total of five years and \$10,000 fine; appellant was remanded into custody of the United States [C. T. 579].

On July 10, 1951 appellant filed a notice of appeal; on July 11, 1951 appellant filed a petition for admission to bail pending appeal [C. T. 579].

The Commissioner of Internal Revenue authorized jeopardy assessments against appellant for the calendar years 1945, 1946 and 1947, and against appellant and his wife, jointly, for the calendar year 1948 in a telegram dated July 12, 1951 [Ex. 683]; pursuant to this telegram, notice of the assessments and demand for payment were made personally upon appellant and his wife on July 13, 1951, in the Los Angeles County Jail where appellant was confined, having elected not to commence his sentence and awaiting the decision on his bail request and while his wife was visiting him [R. T. 5026-5028; 5055-5060]. On July 13, 1951 Warrants for Distrainment were issued and Notice of Federal Tax Liens were filed [Exs. 846, 847].

On July 13, 1951 bail pending appeal was denied for lack of a substantial question on appeal [C. T. 579]. In the following five months appellant was in the United States Court of Appeals for the Ninth Circuit on bail applications at least three times and he received some five orders from the Court, one of which granted appellant bail pending appeal but was stayed and eventually vacated by a *per curiam* order [C. T. 579; 191 F. 2d 300, 192 F. 2d 933]. Appellant exercised his right under Rule 38(a)(2) of the Federal Rules of Criminal Procedure not to commence service of his five-year sentence.

On August 9, 1951, less than sixty days after the jeopardy assessments were made (July 13, 1951), appellant was mailed a deficiency letter (often called a 90-day letter) with respect to his income taxes for the years 1945, 1946 and 1947; and this letter was sent by registered mail to appellant's "last known address," 513 Moreno Avenue, Los Angeles 49, California [Ex. 842; R. T. 5071-5073]. On the same date, August 9, 1951, appellant and his then wife were mailed a deficiency letter with respect to their joint income taxes for the year 1948; and this letter was sent by registered mail to appellant's and his then wife's "last known address," 513 Moreno Avenue, Los Angeles 49, California [Ex. 843; R. T. 5071-5074].

Neither appellant nor his then wife petitioned the Tax Court [R. T. 5071, 5075; Exs. 842-845]. No substantial portion of these jeopardy assessments has ever been paid by appellant or his then wife [Ex. 5].

Appellant and his then wife were also assessed as to the years 1949 and 1950; however, this was a regular assessment as distinguished from a jeopardy assessment. A notice of demand for payment of taxes for the years 1949 and 1950 was mailed to appellant and his then wife at 513 Moreno Avenue, Los Angeles

49, California; this produced no payment; so on May 8, 1952 appellant and his then wife were mailed a deficiency letter with respect to their joint income taxes for the years 1949 and 1950, and this letter was sent by registered mail to appellant's and his then wife's last known address, 513 Moreno Avenue, Los Angeles 49, California [R. T. 5025-5053; Ex. 844].

Neither appellant nor his then wife petitioned the Tax Court regarding the regular assessment for the years 1949 and 1950 [Exs. 844, 845]. No substantial portion of this assessment has ever been paid by appellant or his then wife [Ex. 5].

None of the letters referred to above were returned to the sender, and the address to which these letters were sent was the address supplied by appellant and his then wife on the tax returns for at least the years 1948, 1949 and 1950 [R. T. 5025-5053].

The total amount assessed for the six years as of October 9, 1955 was \$135,847.94, excluding interest and penalties [R. T. 5033-5034; Ex. 946]; and the same amount for the same years is still due and owing.

On September 11, 1951, pursuant to a notice of levy and a warrant of distraint authorized and issued on July 13, 1951, the Collection Division of Internal Revenue Service seized appellant's Cadillac then in the possession of Hillcrest Motors, and on September 17, 1951 applied the \$200.00 proceeds thus obtained to appellant's tax liability [R. T. 5110, 5112, 5136-5137, 5151-5152; Exs. 5, 846].

Lavonne Farkas married appellant on October 15, 1940 and divorced him on June 18, 1959; she and appellant had lived in an eight-room, one-story house at 513 Moreno, Los Angeles, from 1948 until September of 1951 [R. T. 4808-4809, 4938]. After appellant was convicted in 1951, his wife frequently visited him in the Los Angeles County Jail, and appellant re-

ceived a large number of letters while he was in the Jail [Ex. 587].

Appellant was released from custody on October 9, 1955, and a few weeks later appellant told James A. Vaus, Jr., that he had some bonds but couldn't cash them because of the Government [R. T. 704].

In June of 1956 a collection officer for Internal Revenue Service saw appellant in Vaus' office and asked him for payment on his back taxes; appellant did not pay anything; the officer left tax collection waiver forms with appellant [R. T. 5175; Ex. 848]. On August 17, 1956 appellant, his wife, and his attorney at the time, Paul Caruso, met with two collection officers in Caruso's office to sign the tax collection waivers; appellant signed two tax collection waivers, each of which is dated August 17, 1956; one waives the statute of limitation as to collection of the assessed taxes for 1945, 1946 and 1947, and the other waives the statute of limitation as to collection of the assessed taxes for 1948, 1949 and 1950; appellant's wife executed similar waivers [R. T. 5184; Ex. 848]. One of the waivers signed by appellant provides:

"It is hereby agreed by and between Michael Cohen, 513 Moreno, Los Angeles, Calif. of now: 1550 Woodruff Ave, Los Angeles, California, party of the first part, and the Commissioner of Internal Revenue, party of the second part, that the amount of \$108,029.23, representing the unpaid balance of an assessment of income tax for the period(s) *See over* made against the said party of the first part, appearing on the assessment list, under Serial No. *See over*, for the Los Angeles District, may be collected (together with such interest, penalties, or other additions as are provided for by law which have accrued and which may accrue on the assessment) from said

party of the first part by distraint or by a proceeding in court begun on or before December 31, 1962" [Ex. 848].

On the reverse side of this same waiver the following information is provided: the date and type of tax involved, the account number, the date of assessment, and the unpaid balance.

Throughout the period of time charged in Count Four, the Collection Division of Internal Revenue Service made numerous attempts to obtain payment on the assessed taxes of appellant [R. T. 5118-5171]. In this regard there were many contacts with appellant and a number of conferences with appellant and his representatives; by way of illustration, the following are referred to: two meetings with Harmon for one of which Harmon was alone and for the other appellant and Mrs. Churchin were also present [R. T. 6377-6380, 6388-6390, 5177]; two conferences which form the basis for Counts 12 and 13; conferences and correspondence with appellant's attorney, George Bieber [R. T. 2103]; and conferences and correspondence with appellant's accountant, Sam Chilkov; to name but a few.

Appellant, as is noted above, told many people that he was engaged in a plan to settle his account with the Government, *e.g.*, Jones, Krause, Leitner, Hecht, to name but a few.

Count Four charges that appellant attempted to evade and defeat the payment of past due, owing and duly assessed taxes by wilfully failing to pay said taxes and by wilfully and knowingly misrepresenting to and concealing from the Government the true state of his financial affairs in that he conducted himself in a certain fashion that is described in seven subheadings. We shall briefly detail the funds available to appellant with which he could have made some payment on his tax liability and then briefly give examples of how he con-

ducted his financial activities within the seven sub-headings listed in Count Four of the Indictment.

In the period between October 10, 1955 and September 16, 1960 appellant received in excess of \$356,738.10 [Ex. 945]. (Actually this exhibit does not include some \$36,775.00 obtained from the following people in the amounts indicated: Mitchell—\$500.00 [Court's Ex. 2], Vaughn—\$1,000.00 [Ex. 786], Mandell—\$4,500.00 [Exs. 170-D, 173-A], Henschel—\$5,000.00 [R. T. 7349], Maidy—\$2,000.00 [Exs. 173-A, 587]; Fogelson—\$275.00 [Ex. 173-A], Tom Cohen—\$22,500.00 [Ex. 170-D]).

The Government's figures (excluding the additional \$36,775.00) break down as follows:

1955	\$ 1,800.00	
1956	32,840.60	
1957	127,875.83	
1958	151,391.67	
1959	26,000.00	
1960	16,830.00	
		<hr/>
Total:	\$356,738.10	[Ex. 945]
plus:	36,775.00	
		<hr/>
		\$393,513.10

Oren Cummins, appellant's accountant throughout the trial, calculated the cash received by appellant for just 1956, 1957 and 1958, and his figures are as follows:

1956	\$ 26,840.60	
1957	158,545.83	
1958	153,033.70	
		<hr/>
Total	\$338,420.13	[R.T. 7490-7491]

Neither set of figures included the many thousands of dollars paid out by the Greenhouse to the Carousel on appellant's behalf to: restaurants, laundries, friends like McNulty, automobile payments, steam baths, clothing, air-conditioners and furnishings, hotels, and travel accommodations, telephones and answering services [Exs. 714, 945, 947, Q]. Thus, appellant personally and directly received cash or its equivalent during the period in question of nearly \$400,000.00, and during this same period appellant conducted his financial affairs as set forth below.

As we noted above, Count Four charges specific types of conduct, and we shall now briefly illustrate each type.

**1. Denied to Agents of the Internal Revenue Service
That He Had Any Assets.**

This subject matter is specifically treated below under Counts 12 and 13, the false statements to a Government agency counts.

**2. Placed and Caused to Be Placed His Assets in the
Names of Others.**

Appellant had a series of Cadillacs registered in the names of others (see Counts 5 through 8 below). Appellant spent many thousands of dollars in apartment furnishings which were insured under the name of Ralph Sills [R. T. 2496]. Appellant possessed a 12.69 carat diamond ring which he had pawned in the name of A. Beaudoin although the ring was his and he got the money from the pawn shop [R. T. 3915-3927].

3. Deposited His Assets With Other Persons.

Appellant placed a collection of his jewelry with Billy Gray (see Count 10 below). Appellant placed a valuable ring and watch with Phil Packer [R. T. 4237-

4242]. Appellant placed the 12.69 carat diamond ring with Koomer (see above). Appellant placed bonds with his sister [R. T. 704, 7076-7078].

4. Dealt in Currency.

Appellant was observed on many occasions to be carrying a large roll of bills, *e.g.*, by Jennings, Fortwangler, Bieber, William K. Howard, to name a few. Appellant received \$12,000 in currency from Bieber [R. T. 2068, 2069; Ex. 170]. Appellant received \$14,744 in currency from Attorney Samuel Brody [R. T. 4138-4142; Ex. 559]. Appellant paid Jules Salkin approximately \$8,000 in currency to have a newly built apartment altered before he moved in [R. T. 2892]. Appellant paid many bills in currency, *e.g.*, Al Pignola approximately \$7,000 for suits, Quirino Furiani approximately \$10,000 for interior decorating [R. T. 5875].

Appellant paid clothing bills of \$1,000 for Candy Barr and Liz Renay [Exs. 452-458].

5. Caused His Obligations to Be Paid Through and in the Names of Other Persons.

Numerous personal obligations of appellant were paid for through and in the names of the Greenhouse and the Carousel, including but not limited to the following: payments on his Cadillacs, laundry, air-conditioners, restaurants and night clubs, hotels, air transportation, hats and clothing [Exs. 714, 945, Q]. Appellant frequently purchased or caused checks of someone to pay someone else, *e.g.*, Bellows' \$10,000 check to pay Bieber [Exs. 334, 335, 347, 361, 423, 424]; Jones' \$1,000 check to pay Eagan [Ex. 289]. Appellant also maintained a clothing account with Clinton Stoner in Bieber's name [Ex. 592].

6. Caused Monies Paid to Him to Be Paid Through and in the Names of Other Persons.

Appellant received many thousands of dollars from various people, and had them make their checks payable to someone other than himself, but he would get the proceeds; the following is merely illustrative of this conduct: Bieber's \$15,000 in checks to Abe Phillips [Exs. 425-427]; Gilbert Kitt's \$7,500 to Lillian Weiner [Ex. 435]; Kaseno's \$8,200 in checks payable to cash [Exs. 383, 385, 386]; James Bernstein's checks payable to James Bernstein [Exs. 34-44]; Bieber's \$7,000 check to Lillian Weiner [Ex. 420]; Bishop's \$6,000 check to Lillian Weiner [Ex. 363]; Pomeranz's \$2,500 check to Jack A. Dahlstrum [Ex. 695]; and the many checks made payable to the Greenhouse, which appellant cashed.

Appellant also told Dean Jennings that any financial transactions he might have with either the *Saturday Evening Post* or with Jennings personally would have to be paid to him through a third party [R. T. 5717-5720].

7. Paid and Caused to Be Paid His Creditors Other Than the United States of America.

Appellant did not pay one cent on his past due, owing and assessed taxes (see above), but he did pay other creditors such as those mentioned above; plus Billy Gray [Ex. 60]; Hillcrest Motor Co. [Exs. 913-917]; Cecil Bechman [R. T. 2260-2279]; Don Bowen for servicing automobiles of appellant and certain of his associates [Ex. 910]; and others [Ex. 947].

Appellant also paid nearly \$7,000 in attorney's fees for Candy Barr, and \$800 to hire private detectives for Candy Barr, and some \$1,700 to hide Candy Barr out in Mexico, and \$9,965.00 to purchase an additional Greenhouse [Exs. 177-178].

F. Counts Five Through Eight.

Each of the Counts Five through Eight charged appellant during a time certain with concealing his interest in a specific Cadillac automobile upon which levy was authorized and doing so with intent to evade and defeat the collection of \$135,847.94 in income taxes due, owing and assessed.

Appellant was found guilty of Counts Five and Eight, and not guilty of Counts Six and Seven.

In the Appendix to this brief is a chart summarizing the evidence relating to the acquisition, financing, and registering of each of the four Cadillacs, plus a Cadillac that was purchased through the Greenhouse by the Churchins and traded in by appellant on the Cadillac involved in Count Five.

In October of 1956 the Churchins purchased a 1956 Cadillac Coupe de Ville for appellant; he selected the vehicle; he made arrangements for the down payment; he alone used the vehicle; the vehicle was purchased in the name of the Greenhouse [R. T. 562-572, 6140-6146, Ex. 607]. The Churchins walked away from the Greenhouse and their investment therein and appellant's sister took over the Greenhouse a few weeks after this vehicle was acquired [R. T. 437; Ex. 121]. This vehicle was traded in less than four months later on on a 1957 Cadillac El Dorado Seville, which appellant selected and exclusively used although it was registered in the name of the Greenhouse [R. T. 6147-6149].

On August 29, 1957 appellant's sister sold the Greenhouse to Joel Hamamoto; however, the Cadillac was not sold—it stayed in appellant's exclusive control and this is Count Five [R. T. 7262; Exs. 179, 190-196].

On September 18, 1957 appellant traded the 1957 Cadillac El Dorado Seville in for a 1957 Cadillac El Dorado Brougham; he selected the vehicle, he had ex-

clusive control over the vehicle, and he had it registered in the name of George or Lillian Weiner [R. T. 6160-6164; Exs. 197-204]. This is the Cadillac in Count Six of the Indictment.

On March 11, 1959 appellant traded in the 1957 Cadillac El Dorado Brougham on a 1959 Cadillac El Dorado Biarritz; he selected the vehicle, he had exclusive control over the vehicle, and he had it registered in the name of Lillian Weiner [R. T. 6165-6175; Exs. 206-216, 570]. This is the Cadillac in Count Seven of the Indictment.

On February 2, 1960 appellant traded in the 1959 Cadillac El Dorado Biarritz on a 1960 Cadillac El Dorado Seville, he selected the vehicle, he had exclusive control over the vehicle, and he had it registered in the name of Lillie Weiner [R. T. 6175-6181; Exs. 218-233]. This is the Cadillac involved in Count Eight of the Indictment.

Each of these five Cadillacs were purchased from Hillcrest Motor Company, and in each instance the prior Cadillac was a trade-in. The payments on these Cadillacs were made either with Greenhouse checks, Carousel checks, or Lillian Weiner's own checks, and charged against appellant through either the loans payable account of the Greenhouse or the exchange account of the Carousel [Exs. 713-A-K, 714, 947].

Oren Cummins, appellant's accountant during the trial, credited appellant with the sales taxes paid on the purchase of these Cadillacs [R. T. 7563-7576; Exs. R, S, T]; Cummins also credited appellant with the interest paid on the purchase and repair of these Cadillacs; Cummins also testified that he considered the Cadillac in Count Five of the Indictment an asset of appellant because "after discontinuing the business of the Greenhouse . . . he took it, I don't know why it wouldn't be his" [R. T. 7565].

G. Count Nine.

Count Nine of the Indictment charges that from October 9, 1955 to January 29, 1960 appellant concealed a 12.69 carat diamond ring upon which levy was authorized, with intent to evade and defeat the collection of \$135,847.94 in income taxes due, owing and assessed.

Appellant was found guilty on this Count.

In the late 1940s appellant gave his wife a 12.69 carat diamond ring [R. T. 4808; Ex. 681]. In 1950, when appellant was being investigated for tax evasion, he took this ring and a number of other pieces of her jewelry from his wife [R. T. 4817]. Appellant was convicted in 1951 and released from custody on October 9, 1955 (above). After appellant came home from the penitentiary his wife on several occasions asked for her jewelry back, and appellant told her that he no longer had it; she divorced him in 1959 and received a dollar a year alimony [R. T. 4817-4818].

Appellant's story is that in 1950 he took this ring and some other jewelry of his wife's and his own and left it with Joe Henschel in New York, who "loaned" him \$30,000 at the time; when appellant came home, and after he was off parole sometime in 1956 or 1957 he went to New York, saw Joe Henschel, and got not only the ring and other jewelry back, but also an additional \$5,000.00 [R. T. 7100-7103]. Henschel, according to appellant, died before trial [R. T. 7344].

On March 14, 1957 appellant met with collection officers of Internal Revenue Service and told them he had no assets of any kind that he knew of (this is Count Twelve of the Indictment).

In May of 1957 appellant asked Koomer for a big check to take back to New York and for which appellant would give Koomer the value of the check (appellant used the Jewish expression "varda"); Koomer gave

appellant two checks totaling \$10,000.00, and appellant gave Koomer the 12.69 carat diamond ring as “varda”; Koomer was not satisfied with the transaction so he stopped payment on his two checks and so advised appellant; appellant reclaimed the ring and returned Koomer’s two checks; Koomer had the ring for about a day [R. T. 2403-2414; Ex. 681].

Appellant in May of 1957 gave Billy Gray a collection of jewelry to hold as security for numerous financial transactions between the two men, and this his jewelry was returned to appellant in late 1958 (this jewelry is the basis of Count Ten of the Indictment). Included in this collection of jewelry was the 12.69 carat diamond ring [R. T. 3734-3740, 3806].

Alvin Beaudoin, a part-time actor, met appellant in the summer of 1958 and became friendly with him [R. T. 3909-3915]. On October 17, 1959 appellant went to Beaudoin’s home; appellant wanted to borrow \$10,000 to \$15,000 in connection with Candy Barr; appellant produced the 12.69 carat diamond ring, showed it to Beaudoin, and offered it as collateral; Beaudoin said it was impossible for him to raise the money as his funds were all tied up in Detroit, but Beaudoin told appellant that with a ring like the one he had he could probably pawn it and get \$5,000 [R. T. 3916-3918]. Appellant told Beaudoin that he personally could not pawn the ring, whereupon Beaudoin offered to do so and telephoned Herb Clark of the Hollywood Collateral Loan Company in Hollywood, California; appellant gave the ring to Beaudoin; Beaudoin and his wife took the ring to the pawnshop and were offered \$2,500.00 for it; they declined the offer, went to the parking lot beside the pawnshop, met appellant, advised him of the offer, and appellant told him to take the \$2,500.00 and bring it to a designated coffee shop where he would be waiting; the Beau-

doins went back to the pawnshop and were able to get \$3,000.00 for the ring which they put in a white envelope along with the pawn ticket and turned the envelope over to appellant at the coffee shop [R. T. 3918-3927]. Mrs. Beaudoin and Herbert Clark, the pawnbroker, testified about this transaction substantially the same as above [R. T. 3939-3973; Exs. 589, 801, 802].

On December 2, 1959, at Rondelli's restaurant in Los Angeles, a man was shot and slain; appellant was in attendance at the time, along with Claretta Hashagen, George Perry, Sam Lo Cigno, Joseph De Carlo, Roger Leonard and Phil Packer (all of whom were witnesses in the trial below); appellant was questioned and arrested by the police investigating the homicide and at that time he had the pawn ticket in his pocket [R. T. 4412].

Appellant admitted from the witness stand that he gave the ring to Koomer as security for Koomer's checks [R. T. 7093]. Appellant appears to have admitted that the ring was among the collection of jewelry that Billy Gray held for him [R. T. 7104].

H. Count Ten.

Count Ten of the Indictment charges that from May 15, 1957 to May 15, 1958 appellant concealed a collection of jewelry upon which levy was authorized, with intent to evade and defeat the collection of \$135,847.94 in income taxes due, owing and assessed.

Appellant was found guilty on this Count.

As was seen above in the facts pertinent to Count Nine, appellant in 1950 gathered up his and his wife's jewelry. Appellant claims he received \$30,000.00 on a pledge of this jewelry to Joe Henschel in New York, and in 1956 or 1957 he retrieved this jewelry and an

additional \$5,000.00 from Henschel; appellant further states he then took some of his personal jewelry out of this collection and turned the rest over to Billy Gray to hold for him [R. T. 7104].

William Victor Gray, known as Billy Gray, the owner of the Band Box night club and an entertainer for some 30 years, met appellant in the late 1930's in Chicago [R. T. 3722-3725]. Gray had numerous contacts with appellant in the years between 1955 and 1960, including a five-day trip to Chicago as appellant's guest, and a week long fishing trip in La Paz, Mexico, with appellant and others [R. T. 3727-3729].

In the spring of 1957 appellant approached Gray in a parking lot and stated that he had gone into the greenhouse business and that he needed a little money (three months later the Greenhouse was sold to Hamamoto), and appellant offered Gray, as security for the money, a box of jewelry; Gray transferred \$10,000.00 to appellant and appellant handed Gray a box of jewelry in which there were diamond rings (including the 12.69 carat diamond ring), earrings, clips, a necklace, pencils, knives, and miscellaneous little pieces; Gray placed the box of jewelry in his safety deposit box [R. T. 3729-3741]. Appellant repaid Gray in approximately one month and Gray returned the jewelry to appellant [R. T. 3743]. Appellant in May of 1957 again approached Gray with a request for money, which Gray answered, and for which Gray once again received this same box of jewelry; Gray took the jewelry home, showed it to his wife, and then hid it behind the cedar paneling in the master bedroom of his home where it remained for at least a year before it was returned to appellant [R. T. 3742-3748]. In the next full year Gray borrowed some \$56,000 from his bank in some ten different loans and turned it all over to appellant in either cash or cashier's checks; and

appellant repaid either Gray or the bank in cash in the same year; the largest outstanding balance on these loans at any one time was \$21,000.00 [R. T. 3748-3772; Exs. 48-60]. It was during this same year that Gray held appellant's jewelry. At the time these loans commence, appellant also offered Gray a piece of appellant's life story [R. T. 3795-3796]. Appellant was a frequent visitor at Gray's night club and his tabs were paid by Greenhouse checks [R. T. 3772-3783]. Gray also cashed a large number of checks for appellant in which he turned the cash over to appellant as contrasted to applying the check or the proceeds to the balance appellant owed him, including: five checks of the Krauses totaling \$14,500.00 and three checks of Bieber's payable to Abe Phillips [R. T. 3772-3790]. During the trial, and while appellant's wife was on the witness stand, appellant, through his attorney, produced the box of jewelry (minus some pieces) that is the subject matter of this Count [R. T. 4926-4931; Ex. H].

I. Count Eleven.

Count Eleven of the Indictment charges that on December 2, 1959 appellant concealed a 3½ carat diamond cats-eye ring, a heart-shaped diamond pendant, a wrist watch with a platinum band, and an \$800.00 Western Union Money Order payable to appellant, upon which levy was authorized, with intent to evade and defeat the collection of \$135,847.94 in income taxes due, owing, and assessed.

Appellant was found not guilty on this Count.

On December 2, 1959, at Rondelli's restaurant in Los Angeles, California, a man was shot and killed; Claretta Hashagen was present at the time with appellant, as was Roger Leonard, Joe De Carlo, George Perry, Sam Lo Cigno, and Phil Packer; after the

shooting Claretta Hashagen left the restaurant and as she was leaving Phil Packer handed her the ring, the watch, and the money order which she took with her when she drove home alone in appellant's Cadillac [R. T. 4650-4653]. The police took Claretta Hashagen to the police building for questioning the following day, and while she was there she wrote a note to her sister directing her to turn over to the police the ring, the watch, the money order, and the pendant [R. T. 4653-4659]. Claretta Hashagen testified that the pendant was a gift to her from an unidentifiable male of indeterminate height, weight and age, and she received it prior to meeting appellant [R. T. 4644-4649].

Both Phil Packer and appellant testified that the watch and ring belonged to appellant, but that when appellant borrowed \$9,750.00 from Packer in 1956 he gave Packer these items to hold as security; they both say that appellant borrowed the jewelry from Packer on occasions and returned it when he was finished with it; neither one of them could recall who had this jewelry on December 2, 1959 [R. T. 4249, 7354-7355].

The \$800.00 Western Union Money Order was the payment of a gambling debt that was sent to appellant by Sam Schanker because Schanker could not locate the man who won the bet: Sam Lo Cigno, who denies he ever made the bet [R. T. 4713-4715, 4724]. On the night of December 2, 1959 appellant left the restaurant, went to the Western Union office, picked up the \$800.00 money order, and returned to the restaurant [R. T. 4502-4506].

J. Count Twelve.

Count Twelve charges that on March 14, 1957 appellant falsified, concealed, and covered up a material fact and made a false statement and representation to the Internal Revenue Service in that appellant stated that he had no assets of any kind that he knew of.

Appellant was found not guilty on this Count.

Following appellant's release from confinement on October 9, 1955, collection officers of the Internal Revenue Service attempted to collect delinquent income taxes of appellant for the years 1945 to 1950, inclusive. On March 14, 1957 a conference was held between appellant and collection officers Peter J. Cena, Peter Bertoglio and LaVerne Nelson to discuss collection of appellant's delinquent taxes. Appellant was asked what assets he had and he denied having any [R. T. 5127-5128, 5180, 5182]. Appellant was not under oath nor represented by counsel at this conference.

On May 3, 1957 appellant cashed savings bonds, held in his own name since the early 1940's, receiving \$7,345.30, including interest [R. T. 786-789]. During the trial, at least two witnesses testified about appellant's possession of these bonds. James Vaus was told by appellant in late 1955 that appellant had bonds but could not cash them because of the Government [R. T. 704]. Robert Cowan in December 1955 saw bonds in appellant's possession [R. T. 748-752].

Phillip Packer, a long-time associate of appellant, testified in trial that he had loaned \$9,500.00 to appellant between November 19, 1956 and December 3, 1956 and received as security certain jewelry from appellant [R. T. 4232-4237; Exs. 682, 829]. Appellant from time to time received the jewelry back from Packer who would wear it and then return it to Packer [R. T. 4241-4242]. When not in use by appellant the jewelry was kept in a trunk by Packer [R. T. 4240].

K. Count Thirteen.

Count Thirteen charges that on September 18, 1957 appellant falsified, concealed, and covered up a material fact and made a false statement and representation to the Internal Revenue Service in that appellant stated that no person had any property or rights belonging to him exclusive of the rights in a book concerning his life story.

Appellant was found guilty on this Count.

After nearly two years of attempting to collect past due, owing and assessed taxes of appellant without success, collection officer Guy McCown had a summons served upon appellant calling appellant to come in to discuss ways and means of paying his liabilities [R. T. 5275].

On September 18, 1957 appellant appeared with his accountant, Samuel Chilkov, C.P.A., at the offices of the District Director of Internal Revenue, Los Angeles, California; at that time officer McCown explained to appellant that he was "summoned to appear and to testify with regard to his financial position and for the purpose of determining ability to pay taxes owing by him to the United States" [R. T. 5209-5210; Ex. 587]. McCown then went on to tell appellant that he was going to be placed under oath, but first outlined the position of the Government with regards to appellant and the tax assessments owed by appellant; McCown then explained to appellant in some detail the duties and functions of Internal Revenue Service; and when he concluded he asked appellant if appellant had any preliminary statement to make before being sworn, to which appellant replied, "I can't think of any"; appellant was then placed under oath [R. T. 5210-5213; Ex. 587].

McCown began the questioning by advising appellant that he did not have to answer any question that

would incriminate him; and then advised appellant that “a record of our conference here today is being made, and when it is completed a copy of it will be made available to you” [R. T. 5213; Ex. 587].

McCown then inquired into appellant’s background, employment and monthly expenses; McCown then asked in three different forms whether appellant had any assets when he came home from prison that could have been applied to reduce appellant’s liability to the Government had appellant been so inclined, and appellant finally said that he was able to lay his hands on about \$8,000 that has since been used [R. T. 5219-5221; Ex. 587].

The following questions were then asked of appellant by McCown and appellant gave the following answers:

“Q. At this time in round figures of a thousand dollars more or less, exclusive of your clothing or any furniture that you may own, what would you say your net worth is?

(Conference is had between Cohen and Chilkov).

Q. I will re-word my question. What would you consider your assets to be exclusive of the book or picture rights that there may be to the book? Exclusive of that and exclusive of monies that have been invested in that? Cash, bonds, real estate, jewelry over and above rings and watch that a man may wear. Are you worth \$10,000.00?

A. No, sir.

Q. Are you worth \$5,000.00? A. No, sir.

Q. Now sir, do I understand that you are at this time without funds other than money that is

advanced on the picture or in anticipation of the picture or book or what they will produce?

A. That is absolutely correct.

Q. Does any member of your immediate family, your brothers, your sisters, your mother, your stepfather or anyone else in your family hold assets that belong to you? A. Not one nickel.

Q. Does anyone have any property or rights belonging to you exclusive of the book or its potential worth? A. No, sir.” [R. T. 5221-5222; Ex. 587].

After this answer, attention was focused on the Greenhouse and appellant’s affiliation thereto with appellant supplying long narrative answers, some ten pages in length; at four o’clock that day the conference was recessed and it resumed at two o’clock the next day, September 19, 1957, with appellant and his accountant in attendance [R. T. 5222-5240; Ex. 587]. In this session, McCown by way of summary said:

“Q. As of the present moment your net worth consists of clothing and personal effects. You have no real estate, no stocks, no bonds or no properties other than personal effects?”

to which question appellant replied: “None whatsoever . . .” and then appellant told about some old gambling equipment he once owned [R. T. 5241; Ex. 587].

The rest of the conference took up money appellant had borrowed, or had been given to him, and the status and development of appellant’s life story for commercial exploitation [R. T. 5244-5255; Ex. 587].

In the first week of October 1957 McCown met with appellant and gave him a copy of the statement [Ex. 587] and discussed the payment of taxes [R. T. 5256].

Appellant, on December 5, 1957, wrote a letter to McCown in which he said: "I have reviewed the transcript of our conference of September 18th and 19, 1957 and except for some minor errors, the transcript is correct" [Ex. 588].

It was from May of 1957 to at least May of 1958 that appellant's jewelry was secreted in Gray's home (*supra*).

It was from late 1956 until December 2, 1959 that appellant's ring and watch were in Packer's trunk (*supra*).

Two days before the conference, September 16, 1957, appellant obtained \$5,000.00 from Stemler supposedly for sales tax and labor bills that had to be paid to close out the escrow selling the Greenhouse (*supra*).

On the very day the conference commenced, September 18, 1957, appellant traded in the 1957 Cadillac El Dorado Seville on a 1957 Cadillac El Dorado Braugham, costing a total of \$16,222.24 (*supra*).

On the second day of the conference, September 19, 1957, appellant cashed two checks: a \$5,000.00 check of George Bieber's, and a \$4,000.00 check of Billy Gray's.

V.

ARGUMENT.

A. Preliminary Statement.

In appellant's brief he lists 18 specifications of error, 13 of which concern jury instructions [5 through 17], and 3 of which are general in nature and for which the underlying record in the trial court is not set forth [1, 4 and 18]. Appellant, in his brief, sets forth 9 arguments but without particular reference to the 18 specifications of error. Some of the specifications of error are not argued at all [5, 6 and 16] and others are argued only inferentially [1, 4 and 18].

The only argument raised by appellant that affects Counts 5, 8, 9 and 10 of the Indictment is his argument IX.B. on the sufficiency of the evidence; there are no errors specified that relate specially or particularly to any of these four counts.

Appellee shall take up each of appellant's arguments, only not in the same sequence appellant utilized, but rather in a sequence that follows the counts of the Indictment, and thus the statement of facts, in chronological order.

B. Summary of Appellee's Argument.

- (1) There Was No Error Involved in the Jury Instructions Given and Refused Relating to Counts Two and Three of the Indictment; and the Verdict as to Counts Two and Three Was Supported by Substantial Evidence and Was Not Contrary to the Weight of Evidence.
 - (a) The rule of this Court pertaining to assigning jury instructions as errors on appeal were not followed.
 - (b) Rule 30 of the Federal Rules of Criminal Procedure was not followed.
 - (c) The trial court did not err in refusing to give appellant's requested instruction No. 18, because it gave it in substance and effect.
 - (d) The trial court did not err in refusing to give appellant's requested instruction No. 26, because it is an unsupported conclusion of fact and not a statement of law.
 - (e) The trial court did not err in refusing to give appellant's requested instructions Nos 63, 74-80, relating to California crimes, because said instructions do not set forth applicable law; and the court did not err in giving its instructions as to what constitutes income because said instructions do set forth applicable law.
 - (f) The verdict of guilty as to Counts Two and Three was supported by substantial evidence and was not contrary to the weight of evidence.
 - (g) The trial court did not err in refusing to give appellant's requested instructions Nos. 37, 49, and 56 pertaining to lesser included offenses, because they are legally inaccurate.

- (2) It Was Not Error for the Trial Court to Admit the Testimony Pertaining to Religious Activities, Matters and Beliefs of Appellant Because Such Testimony Was Relevant and Material to Issues in the Case.
- (3) The Requirements of Law That Appellant Receive Notice of the Deficiency Were Complied With.
 - (a) The mailing of the notice of deficiency was in compliance with the statutory requirements.
 - (b) The law does not require the Government to give personal notice of a deficiency, and in any event the evidence shows that appellant had personal knowledge of the deficiency.
- (4) Appellant Was Not Placed in Double Jeopardy.
 - (a) 26 U. S. C. 7201 defines more than one offense.
 - (b) Appellant was not prosecuted twice on the same facts or transactions.
- (5) The Verdict of Guilty as to Counts Five, Eight, Nine and Ten Was Supported by Substantial Evidence and Was Not Contrary to the Weight of Evidence.
- (6) Appellant Was Properly Convicted of Violating 18 U. S. C. 1001.
- (7) The Court Did Not Err in Denying Appellant's Motions for Mistrial.
 - (a) Appellant was not denied his right to counsel because his attorney was a Government witness.
 - (b) The court did not err in denying appellant's motions for mistrial based on newspaper publicity.

C. There Was No Error Involved in the Jury Instructions Given and Refused Relating to Counts Two and Three of the Indictment; and the Verdict as to Counts Two and Three Was Supported by Substantial Evidence and Was Not Contrary to the Weight of Evidence.

1. The Rules of This Court Pertaining to Assigning Jury Instructions as Errors on Appeal Were Not Followed.

The Rules of the United States Court of Appeals for the Ninth Circuit provide in pertinent part that appellant's brief shall:

“When the error alleged is to the charge of the court, the specifications shall set out the part referred to *totidem verbis*, whether it be in instructions given or instructions refused, together with the grounds of the objections urged at the trial” (Rule 18. Briefs 2. (d)).

In appellant's specifications of errors 5 through 16 he sets out in full his requested instructions which he claims were refused; but in his specification 17 he merely cites three of his requested instructions which the court refused to give by number. Appellant argues (Argument VII) that it was error to fail to give these three instructions, and even in his argument he fails to set forth the requested instructions. This Court need not and should not consider appellant's specification 17 and Argument VII, if its rules are to be effective.

The Rules of this Court also require that the grounds of objections urged at the trial be set forth. This rule was not followed as to any of the specifications 5 through 17 or in the arguments on jury instructions (V, VI and VII).

2. Rule 30 of the Federal Rules of Criminal Procedure
Was Not Followed.

Rule 30, entitled “Instructions”, provides:

“At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.”

The first three sentences of this rule were followed to the letter [R. T. 7586-7594]. The fourth sentence of this rule has been totally ignored by appellant. At the conclusion of the court’s instructions to the jury, the trial judge afforded counsel the opportunity to object to the charge or omission therefrom, and appellant’s counsel did in fact object to the failure to give all of his requested instructions. Appellant did not set forth any grounds of his objections to any of the instructions he raises here as error [R. T. 8039-8041]. This of course explains why appellant did not conform to this Court’s Rule about setting forth the grounds of the objections urged at the trial—he didn’t put forth any grounds of objections at the trial.

3. **The Trial Court Did Not Err in Refusing to Give Appellant's Requested Instruction No. 18, Because It Gave It in Substance and Effect.**

Appellant's specification 5 and his argument V claim it was error to refuse to give his requested instruction No. 18 which deals with "Mere suspicion is insufficient proof of fraud." The court instructed:

"You must not indulge in speculation or guesswork under any circumstances, nor hastily or lightly draw inferences or conclusions . . . you may not pile inference upon inference. . . ." [R. T. 8017].

"It is not sufficient for the Government to prove any material fact by either guesswork, speculation, conjecture, suspicion, or by a preponderance of the evidence, or only to the extent that the evidence pertaining to such fact is evenly balanced, or uncertain, or is as consistent with guilt as with innocence. None of these is sufficient to prove essential facts in a criminal case." [R. T. 8027].

Obviously, the instructions given not only cover the instruction requested, but do so in a superior fashion. The Court in trial advised counsel in writing that appellant's requested instruction No. 18 would be substantially given [R. T. 7590].

4. **The Trial Court Did Not Err in Refusing to Give Appellant's Requested Instruction No. 26, Because It Is an Unsupported Conclusion of Fact and Not a Statement of Law.**

Appellant's specification 6 claims it was error not to instruct the jury that monies received by appellant pursuant to or in anticipation of certain instruments executed by appellant were loans and as such are not income. Appellant did not even argue this specification. It is apparent that this requested instruction is unin-

telligible and ambiguous on its face, and, of course, it assumes as if it were an established fact the very issue before the jury, namely: whether or not such monies were loans. This instruction is tantamount to a directed verdict, and as such there is no basis for it.

5. The Trial Court Did Not Err in Refusing to Give Appellant's Requested Instructions Nos. 63, 74-80, Relating to California Crimes, Because Said Instructions Do Not Set Forth Applicable Law; and the Court Did Not Err in Giving Its Instructions as to What Constitutes Income Because Said Instructions Do Set Forth Applicable Law.

Counts Two and Three of the Indictment charge an attempt to evade and defeat income taxes, and it was the Government's position that appellant had acquired income in the years charged which he had not reported on his income tax returns. The Government was able to show that appellant had received large sums of money which he did not report on his income tax returns and from which he derived the economic use and benefit; the specific amounts of money, the source of the money, the manner in which the money was received and when it was received were all shown. The Government contended that such money was taxable income; appellant contended that such money was not taxable income because it was bona fide loans. The court instructed, in essence, that money received from any source constitutes taxable income when its recipient has such control over it that as a practical matter he derives readily realizable economic value from it and has freedom to dispose of it or use it at will; the court also instructed at great length and in great detail as to what constitutes a loan and that a loan is not taxable income. The jury decided that the funds received were taxable income and not loans.

In *Davis v. United States*, 226 F. 2d 331 (6 Cir. 1955), cert. denied 350 U. S. 965 (1956) an income tax evasion case wherein the Government showed that the taxpayer had received large sums of cash, and the source and amounts thereof, which were not reported on his tax returns, and which the taxpayer claimed he was merely holding for another's benefit, the court, while observing that it did not matter whether the taxpayer had received this money legally as a dividend or whether he took it fraudulently, stated:

“While, of course, the burden of proof does not shift in a criminal case, it is the rule that when the government establishes a prima facie case, it is then for the defendant to overcome the inferences reasonably to be drawn from the proven facts. Thus, evidence of unexplained funds or property in the hands of a taxpayer establishes a prima facie case of understatement of income, and it is then incumbent on him to overcome the logical inferences to be drawn from such proof. *United States v. Hornstein*, 7 Cir., 176 F. 2d 217, 220. The government is not required to establish income tax evasion by the same processes and formalities which a taxpayer is required to observe in making his return. The existence of unreported income may be demonstrated by any practical method of proof that is available in the circumstances of the particular situation. It is not incumbent upon the government, in making a prima facie case of evasion, to prove the non-existence of any other deductions than those which the taxpayer has claimed in his return. If the taxpayer legally has other deductions than those which he has claimed, it is his privilege to show them and explain them as part of his defense; *Clark v. United States*, 8 Cir., 211 F. 2d 100, 103; and if a man has a business of a

lucrative nature and is constantly receiving money and depositing it to his own account and using it for his own purposes, this is proof that he has income, and if the amount exceeds exemptions and deductions, that the income is taxable. *Gleckman v. United States*, 8 Cir., 80 F. 2d 394.”

And to the same effect, the court in *Wallace v. United States*, 281 F. 2d 656 (4 Cir. 1960), said:

“We can understand that the jury could easily reject the explanation that these checks were intended to repay a loan from Maurice to Randolph. It is true that the only evidence presented on the Government’s behalf was that the checks were disbursed to Maurice Puckett. However, the explanation offered by Wallace as to these checks does not necessarily destroy their probative value. While the burden of proof does not shift in a criminal case, it is the rule that when the Government establishes a *prima facie* case, it is then for the defendant to overcome the inferences reasonably to be drawn from the proven facts. Thus, evidence of unreported funds or property in the hands of a taxpayer establishes a *prima facie* case of understatement of income, ‘and it is then incumbent on him to overcome the logical inferences to be drawn from such proof.’ ”

It was not the Government’s intention or burden to prove that appellant was a swindler or thief or confidence man, but rather the Government proved that appellant received certain money that he was required to pay income taxes on. It is not necessary for the Government to label the funds.

The Internal Revenue Code, 26 U. S. C. 61, defines gross income in all inclusionary terms as “all income

from whatever source derived,” and then described or illustrates some types of income. There are of course some sources of money that do not constitute income when received, such as return of capital, gifts and loans. The Government does not contend now and did not contend below that loans are income taxable to the borrower when received.

The court in *Davis v. United States, supra*, when discussing this very point, said:

“Appellant makes much of the fact that the government has not fixed a label of some kind on the funds that he took from his corporation. It is not necessary to describe them as additional salary, illicit bonuses, or commissions, or anything more than wrongful diversions, since, as above mentioned, substance controls over form, and taxation is concerned with the actual command over the property taxed.”

To the same effect see: *Dawkins v. Commissioner of Internal Revenue*, 238 F. 2d 174 (8 Cir. 1956).

In other words, the Government has to prove that a taxpayer had unreported income in a certain amount and not that a taxpayer had unreported income obtained by fraud and unreported income obtained by extortion and unreported income obtained by larceny and so on. Appellant's position during the trial was not that he obtained these funds by embezzling them as distinguished from obtaining these funds by swindling people, but rather that he obtained these funds as the result of bona fide loans, and appellant in his brief still takes the same position. Appellant does not cite a single case in support of his position that the jury should have been instructed on the elements of state crimes (Argument V A).

Appellant in specification 10 claims it was error not to instruct as to the elements constituting embezzlement (No. 75), and mentions it briefly in Argument V A; however, appellant in Argument V B admits that the court did instruct the jury as to the elements constituting embezzlement. Appellant is correct the second time; the court instructed quite fully on the elements of embezzlement, and pointed out while so doing that neither party contended nor argued that any of the specific items were acquired by embezzlement [R. T. 7991-7992].

Appellant in his Argument V B claims that there is still doubt in this Circuit as to whether or not receipts obtained by fraud or misrepresentation constitute reportable income, and, therefore, the instruction given as to income (as set forth in appellant's brief) was error. Appellant then goes a step further in Argument VI, and claims that since there is still doubt as to the taxability of ill-gotten gains, appellant could not have known that receipts so obtained were taxable income and hence he could not have acted wilfully. This argument is frivolous.

The United States Supreme Court in 1952 decided the case of *Rutkin v. United States*, 343 U. S. 130, wherein, at page 137, it said:

“An unlawful gain, as well as a lawful one, constitutes taxable income when its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it. *Burnet v. Wells*, 289 U. S. 670, 678; *Corliss v. Bowers*, 281 U. S. 376, 378. That occurs when cash, as here, is delivered by its owner to the taxpayer in a manner which allows the recipient freedom to dispose of it at will, even though it may

have been obtained by fraud and his freedom to use it may be assailable by someone with a better title to it.”

This is not dictum, and is the same rationale the Supreme Court used in *James v. United States*, 366 U. S. 1 (1961). Every Court of Appeals that has considered this area of the law has arrived at the same basic conclusion.

Wyss v. United States, 239 F. 2d 658 (7 Cir. 1957);

Davis v. United States, *supra*;

Bruswitz v. United States, 219 F. 2d 59 (2 Cir. 1954), cert. denied 349 U. S. 913 (1955);

Briggs v. United States, 214 F. 2d 699 (4 Cir. 1954), cert. denied 348 U. S. 864 (1954);

Marienfeld v. United States, 214 F. 2d 632 (8 Cir. 1954), cert. denied 348 U. S. 865 (1954);

Kann v. Commissioner of Internal Revenue, 210 F. 2d 247 (3 Cir. 1953), cert. denied 347 U. S. 967 (1954);

Akers v. Scofield, 167 F. 2d 718 (5 Cir. 1948), cert. denied 335 U. S. 823 (1948).

Appellant, in setting out the trial court’s instruction on income, does not do justice to the court in that the entire instruction on the point is not set out. The court instructed as follows:

“Income, as that term is used in the federal income tax laws, does not include all money and property that may come into the ownership or possession of a taxpayer or be applied to his use and benefit in a given tax year. Certain of such items of money or property are not taxed under the federal tax laws and therefore are designated ‘non-

taxable.’ I will now define for you what constitutes taxable income and, in so doing, I will also enumerate, as far as pertinent in this case, those receipts which are nontaxable. This definition is of basic importance in the case and I suggest you follow the definitions clearly.

“The federal income tax is levied on the net gains, profit and income, of whatever kind and in whatever form paid, derived from wages, salaries or compensation for personal services, or from professions, vocations, trades, businesses, commerce, or sales or dealings in property, whether real or personal; also, from interest, rent, dividends, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

“The tax is imposed on gains or income whether acquired in a lawful or in an unlawful manner. That the taxpayer’s mode of receipt may be illegal, or that his freedom to dispose of a gain may be assailable by someone with a better title to it, has no bearing on whether the gain is income under the tax laws. The law is that financial or monetary gain to a taxpayer, whether lawfully or unlawfully acquired, unless by embezzlement, constitutes taxable income to the taxpayer in the year when the taxpayer has such control over it that, as a practical matter, he derives readily realizable economic value from it.”

* * * * *

“As previously stated, not all money or property received by a taxpayer is taxable income within the meaning of the tax laws. The law provides that certain receipts of property or money do not constitute taxable gain or income within the meaning of the tax laws, and hence are nontaxable re-

ceipts. Insofar as pertinent to this case, nontaxable receipts may be defined to include: the proceeds of bona fide loans and gifts, and money or property which represents a return of capital. In this case the only nontaxable receipts claimed to have been received by the defendant in the indictment years and not credited to him by the Government in its computations presented in evidence are sums which defendant claims he borrowed from others.

* * * * *

“On the other hand (1) funds not received as loans or gifts, or as any other nontaxable receipt as previously defined, but which (2) are actually received, or applied or caused to be applied, by a taxpayer to his personal economic use or benefit, are taxable income to the taxpayer (3) in the year in which as a practical matter he derives readily realizable economic value from them, and must be reported as such in tax returns by the taxpayer. If each and all of the three factors just referred to are proven beyond a reasonable doubt as to particular funds, it is immaterial whether the receipt or application of such funds by the taxpayer be lawful or unlawful, with the exception of embezzled funds. That exception will be explained in a few minutes.

“Basically then, when a taxpayer acquires funds, either lawfully or unlawfully, under a claim of right, without recognition by mutual consent of both payor and payee of the funds, express or implied, of an obligation to repay the funds and without restriction as to their disposition, he has received income which he is required to report in his tax returns as income in the year received. This is true even though it might be claimed that

the taxpayer is not entitled to retain the money, and even though he might be liable to make restitution thereof.”

Appellant cites *James v. United States*, 366 U. S. 213 (1961) in support of his claim that willfullness could not be proven in the instant case because the law was uncertain and unstated as to whether or not funds obtained by false pretenses were taxable income at the time the alleged crime was committed. The invalidity of this paraphrase of the quotation from the *James* case is easily demonstrated by reviewing the status and development of the tax law relating to embezzled funds.

In 1946 the United States Supreme Court decided that embezzled funds did not constitute taxable income. *Commissioner v. Wilcox*, 327 U. S. 404 (1946).

Six years later the same Court held that money obtained by extortion did constitute taxable income, and in the decision the Court specifically limited *Wilcox* to its facts; *Rutkin v. United States*, 343 U. S. 130 (1952). From 1952 on, the law was that “an unlawful gain, as well as a lawful one, constitutes taxable income . . .” (*supra*), and the courts of appeal so ruled as they applied this doctrine from *Rutkin*. There was no uncertainty in this area, and the law was clearly stated. If there was any uncertainty in the area of the taxability of any ill-gotten gains, it was strictly limited to the taxability of embezzled funds, and this was because and only because the *Wilcox* case had not been specifically overruled by *Rutkin*. This uncertain status did not exist as to any other type of ill-gotten gains than embezzlement, because there was no other case like *Wilcox*; hence, the law since 1952 was clear, certain and settled that ill-gotten gains from false pretenses, larceny by trick, fraud and misrepresentation, and swindle constitute taxable income.

It is clear that the *James* case does not support appellant's claim. In fact, the quote relied on by appellant comes from one of the five opinions filed in the case, and just three justices support it. Another justice disagrees with it and would affirm the conviction because:

“... in my view the proof shows conclusively that petitioner, in willfully failing to correctly report his income, placed no bona fide reliance on Wilcox” (p. 241).

Two other justices also disagree and would remand for a new trial to give the trier of fact the opportunity to take into account whether or not *James* relied on *Wilcox*, and said:

“... if the trier of fact, properly instructed finds that the petitioner did not act in bona fide reliance on Wilcox, but deliberately refused to report income and pay taxes thereon knowing of his obligation to do so and not relying on any exception in the circumstances, I do not see why even the strictest definition of the element of ‘willfullness’ would not have been satisfied” (p. 245).

The other three justices, in two more opinions, do not specifically treat the problem.

Factually, appellant was convicted of three counts of tax evasion; and his case was affirmed by this Court in 1953 (201 F. 2d 386). Appellant knew that ill-gotten gains were taxable, just as he knew that bona fide loans were not taxable; in fact, it is patently clear in the record below that appellant knowingly and intentionally arranged his financial affairs to make them appear as if they were loans (see testimony of Liz Renay, Samuel Chilkov, and Louis Wald [R. T. 5923-5935; 6413-6601; 3167-3234]).

Appellant not only did not contend that he relied on the uncertain and unsettled status of law regarding taxability of ill-gotten gains from fraud or swindle, but he specifically denies that these funds were obtained from fraud or swindle, and claims that the money involved was loaned to him. Such a stand, in the face of the overwhelming evidence of swindling, is alone sufficient to indicate that he knew that swindled money was taxable. The *James* case was decided several weeks after the trial below commenced, and both parties relied on it in support of various positions, during the trial.

Finally, looking quickly at the intrinsic value of these requested instructions that were not given, it appears that many of them are unintelligible, ambiguous, and would only confuse and confound the trier of fact. In this regard, appellant also offered instructions numbered 64 through 73 which cover general California criminal law; these were given in substance but not as California criminal law; appellant does not claim that this treatment of these instructions was error. There appear to be some slight discrepancies in the language of some of the instructions, Nos. 63, and 74 through 80, as they are printed in the brief compared to the conformed copies that were served upon appellee during trial, *e.g.*, compare No. 63 as it is in the brief with 63 as it is in the Clerk's Transcript at 479.

6. The Verdict of Guilty as to Counts Two and Three Was Supported by Substantial Evidence and Was Not Contrary to the Weight of Evidence.

In appellant's Argument IX A he blandly challenges the sufficiency of the evidence as to Counts Two and Three of the Indictment without setting forth a statement of the evidence. In fact, he goes even further, and states that the number and complexity of the transactions proven by the prosecution preclude a detailed

treatment of this testimony. Who has the burden of proof at this stage of the case?

Appellee suggests that this Court adopt the conclusions of some of the state courts and find as they did.

In *Hickson v. Thielman*, 147 Cal. App. 2d 11, 304 P. 2d 122 (1956), the court said (p. 125):

“The reporter’s transcript in the instant case contains 246 pages of testimony. The matter occupied the court below for several days. Appellants have made no attempt to make a fair statement, or, indeed, anything approaching a fair statement of the evidence claimed to be insufficient. Their failure to do so will be deemed tantamount to a concession that the evidence supports the findings.”

In *McCosker v. McCosker*, 122 Cal. App. 2d 498, 265 P. 2d 21 (1954), the court said (p. 22):

“Although the reporter’s transcript consists of 340 pages, appellants make no reference whatever to said testimony. The rule is well established that a reviewing court must presume that the record contains evidence to support every finding of fact, and an appellant who contends that some particular finding is not supported is required to set forth in his brief a summary of the material evidence upon that issue. Unless this is done, the error assigned is deemed to be waived. *Kruckow v. Lesser*, 111 Cal. App. 2d 198, 200, 244 P. 2d 19. It is incumbent upon appellants to state fully, with transcript references, the evidence which is claimed to be insufficient to support the findings. The reviewing court is not called upon to make an independent search of the record where this rule is ignored.”

In *Goldring v. Goldring*, 94 Cal. App. 2d 643, 211 P. 2d 342 (1949), the court said (pp. 343-344):

“It is incumbent upon the appellant to state fully, with transcript references, the evidence which is claimed to be insufficient to support the findings. The reports are replete with statements to the effect that the courts are not called upon to make an independent search of the record where the rule is ignored. . . . But we do now give notice that henceforth it will be the practice of this court to disregard claims of insufficiency of the evidence even though that be the only ground of appeal, where the appellant has failed to make a satisfactory statement in the opening brief, or a supplement thereto, of the evidence claimed to be insufficient, with transcript references. Counsel who ignore the rule may expect affirmance of the judgment or order appealed from in proper cases.”

See also:

Smithpeter v. Wabash RR., 360 Mo. 835, 231 S. W. 2d 135 (1950);

Sazear v. Pendergrass, 39 Ariz. 111, 4 P. 2d 386, 388 (1931);

Peters v. Wallace, 127 Okla. 182, 260 Pac. 42, 43 (1927);

State v. Johnson, 39 Idaho 440, 227 Pac. 1052 (1924).

Appellant decides that Counts Two and Three succeed or fail on the life story receipts; he does not say why he so decides; whereas, appellee concurs that Count Three involves only life story receipts; Count Two involves substantially more than just life story receipts (*supra*).

Appellee has not, would not, and shall not ask this Court to decide a case upon hypothetically contrived

facts, and appellee urges this Court to disregard appellant's hypothetical description of a life story transaction. Appellee shall not attempt to rebut appellant's hypothetical transaction other than to point out that it is not supported by the evidence. It is, of course, impossible to factually support a contended for result with non-existent facts. Appellant's ability and adroitness in drawing a conclusion from an unsupported hypothetical, and then claiming that any finding to the contrary is not supported by substantial evidence is interesting but not very persuasive.

Appellant continues by saying that each of the witnesses called by the prosecution (some 190 witnesses were called by the prosecution) testified that, in turning money over to appellant, they were loaning it to him and at all times they considered it to be a loan. In support of this generality appellant gives three citations to the transcript: the first is to Ruth Fisher Benson's testimony, but the prosecution did not charge her life story payments to appellant as income; the second is Charles Schneider's testimony, who, on the page cited, testified that the \$2,500.00 life story transaction that he had with appellant he intended as a loan just as he said on the back of his \$2,500.00 check which reads "Loan made to [appellant] for future deal on motion picture of the life story of [appellant]" [R. T. 827]; and the third is to Dr. Leonard Krause's testimony, who on the page cited doesn't even use the word loan.

As proof for appellant's next claim that these transactions, life story receipts, were loans and were so considered by the parties involved, he gives five transcript citations to show numerous occasions of repayment: the first citation is to the testimony of Jordan Friedman who was repaid \$1,000.00 by appellant after appellant had received \$2,500.00 from Friedman, but appellant was not charged with obtaining "life story

income” from Friedman; the second citation is to the testimony of Attorney George Bieber who was repaid some of the money he transferred to appellant and he still has \$21,500.00 coming, but Bieber’s life story transactions were not charged to appellant as income; the third citation is to the testimony of Billy Gray who is not involved with life story receipts but did get repaid some \$66,000.00 because he was holding appellant’s jewelry; the fourth citation is to the testimony of Abe Phillips who had numerous cash transactions with appellant, but Phillips is not involved with life story receipts; the fifth citation is to the testimony of appellant’s Attorney Jack A. Dahlstrum who testified that appellant handed him \$2,500.00 which he sent to Sam Pomeranz to repay a loan in like amount that Pomeranz made to appellant but through Dahlstrum.

Thus, it has now been demonstrated that not one of his five citations to the transcript support appellant’s claim that the life story receipts were loans and not income, as not one of the witnesses referred to was a transferor of funds to appellant on a life story transaction that the prosecution charged was income to appellant.

Appellant next claims a loan is characterized as such at the time the transaction is entered into, and failure to repay it does not change its characterization; no authorities are cited to support this precept. The court’s instruction on loans is quite informative, helpful, and legally correct [R. T. 7988-7990].

In *People v. Ashley*, 42 Cal. 2d 246, 267 P. 2d 271 (1954); cert. den. 348 U. S. 900, there is an extensive discussion of the problem of proving intent when the issue involves determining whether money turned over to another was a loan or obtaining property by larceny by trick and devise or by false pretenses. In many

ways the facts herein are comparable to the facts in the instant case.

In *People v. Krupnick*, 165 Cal. App. 2d 755, 332 P. 2d 720 (1958), the defendant was convicted of grand theft even though he claimed he was getting loans.

In *People v. Safka*, 174 Cal. App. 2d 312, 344 P. 2d 619 (1959), the court said:

“It is well settled that a loan of money induced by a fraud representation that it will be used for a specific purpose accompanied by an intent to steal amounts to larceny by trick and device.”

Also see:

People v. Reinschreiber, 152 Cal. App. 2d 750, 313 P. 2d 890 (1957).

These California cases, and there are many more of like import, are offered as being illustrative of the proposition that what at first appears to be a loan transaction may, when all the facts are known, really be criminal activity; and the proceeds so derived would be taxable as ill-gotten gains. See: *Rollinger v. United States*, 208 F. 2d 109 (8 Cir. 1953), where the court, following the reasoning of *Rutkin*, held that money obtained through fraudulent representations and swindling constituted taxable income.

Appellant states, “Nowhere throughout this entire transcript has the validity of the life story agreements as binding and legal documents been challenged by the prosecution” (Appellant’s Brief, p. 53). In view of the statement of facts set out above, this patently erroneous generality of appellant’s does not warrant much attention. What life story contracts is appellant referring to? The contract between Guttman and appellant? Appellee does not challenge the validity of that life story contract. And flowing from that contract there is only

one conclusion that can be drawn: appellant, after he signed it, had no right, title, or interest to or in his own life story.

Appellant was extremely careful in that he did not tell a single transferor of money to him based upon his life story about Guttman or that there were any others like them. This is the typical situation of concealing and covering up of a material fact that one in appellant's position was legally bound to disclose. What are the holders of these life story contracts and promissory notes supposed to get? The contract says a percentage of appellant's residuals (whatever that term actually means, and note appellant is the only one able to determine what it would mean). Mathematically, what percentage of appellant's residuals would Bishop get? And how much money would have to be put into appellant's residuals in order to repay Bishop his original \$7,500.00?

Appellant says there was ample testimony that great quantities of money could have been realized from appellant's life story if its full potential had been realized. It appears that this statement would be true about almost anyone's life story; however, appellant cites Hecht, Seide, and Himself as support for this contention. Appellee asks why the full potential was not realized, and, if the full potential were realized, who legally gets what?

Appellant concludes by noting that once these funds were loaned to appellant he was free to dispose of them as he wished. Appellee disputes this as to some particular transactions, but as to others appellee concurs and points out that he could also have used these funds to pay something on his assessed taxes as charged in Count Four.

7. The Trial Court Did Not Err in Refusing to Give Appellant's Requested Instructions Nos. 37, 49, and 56 Pertaining to Lesser Included Offenses, Because They Are Legally Inaccurate.

Appellant's specification 17 and argument VII claims it was error not to instruct the jury with respect to lesser included offenses. Appellant's entire argument is really not an argument, but rather a statement of a contention that 26 U. S. C. 7203 and 7207 are lesser included offenses in 26 U. S. C. 7201. Appellant, in his argument, merely sets forth what he determined were the pertinent parts of sections 7203 and 7207.

Appellee has already noted that appellant failed to comply with this Court's Rule 18 by neglecting to set forth these three instructions, Nos. 37, 49 and 56, *totidem verbis* (*supra*, V. C. 1). Appellant complied with this part of the rule as to his other instructions. Appellee, relying on the set of instructions acquired during the trial, will set forth these three instructions.

Appellant's requested instruction No. 37:

"The crime of willfully attempting to evade or defeat a tax, which is defined in §7201 of the Internal Revenue [26 U. S. C. A. §7201] previously read to you, necessarily includes the lesser offense of willful failure to pay the tax, and the lesser offense of willful failure to supply information for the purposes of the computation, assessment or collection of any income tax imposed by law, both of which lesser offenses are defined in §7203 of the Internal Revenue Code [26 U. S. C. A. (I.R.C. 1954) §7203], as follows:

" 'Any person required * * * [by law] to pay and * * * tax, or required * * * [by law] to * * * keep any records, or supply any information, [for the purposes of the

computation, assessment,] who willfully fails to pay such * * * tax, * * * [or] keep such records, or supply such information, at the time or times required by law * * *.'

shall be punished as the law provides.

"As previously stated, the law permits the jury to find a defendant guilty of any lesser offense which is necessarily included in the crime charged, whenever such a course is consistent with the facts found from the evidence and with the law as given in the instructions of the court."

Appellant's requested instruction No. 49:

"The crime of willfully attempting to evade or defeat a tax, which is defined in §7206(4) of the Internal Revenue Code [26 U.S.C.A. §7206(4) previously read to you, necessarily includes the lesser offense of willful failure to pay the tax, and the lesser offense of willful failure to supply information for the purposes of the computation, assessment or collection of any income tax imposed by law, both of which lesser offenses are defined in §7203 of the Internal Revenue Code [26 U.S.C.A. (I.R.C. 1954) §7203], as follows:" (The rest is the same as No. 37 above.)

Appellant's requested instruction No. 56:

"The crime of willfully attempting to evade or defeat a tax, which is defined in §§7201 and 7206(4) of the Internal Revenue Code [26 U.S.C.A. §§7201 and 7206(4)] previously read to you, necessarily includes the lesser offense of willful failure to supply information for the purposes of the computation, assessment or collection of any income tax imposed by law, both of which lesser offenses are defined in §7203 of the Internal

Revenue Code [26 U.S.C.A. (I.R.C. 1954) §7203] as follows:” (The rest is the same as No. 37 above.)

These three instructions basically say: (No. 37) that 26 U. S. C. 7203 is a lesser included offense in 26 U. S. C. 7201; (No. 49) that 22 U. S. C. 7203 is a lesser included offense in 26 U. S. C. 7206(4); and (No. 56) that 26 U. S. C. 7203 is a lesser included offense in both 26 U. S. C. 7201 and 7206(4).

Appellant, in his brief, did not directly say that he requested an instruction that 26 U. S. C. 7207 is a lesser included offense in 26 U. S. C. 7201, but he so infers. In any event, it is now clear that whether section 7207 is or is not a lesser included offense in section 7201 is not before this.

Appellant in his brief does not argue that section 7203 is a lesser included offense in section 7206(4), and a mere reading of the two statutes explains why.

Thus, instructions No. 49 and 56 were not given, should not have been given, and appellant here does not argue that they should have been given.

This brings us to instruction No. 37, and it is unintelligible, ambiguous, and inherently inaccurate, in that it does not quote section 7203 properly. The words: “for the purposes of the computation, assessment, or collection of any income tax imposed by law” which appear in the requested instruction do not appear in 26 U. S. C. 7203. The instruction as it is could not be given as there is no such crime as the one described in this instruction.

Even were we to assume that there was a proper requested instruction to the effect that section 7203 is a lesser included offense in section 7201, the results would be the same; namely, section 7203 does not define any crimes that are lesser included offenses in the crimes described in section 7201.

Inasmuch as appellant did not see fit to cite a single case in support of his position, appellee shall merely cite the controlling cases without taking this court's time to belabor the point.

Achilli v. United States, 353 U. S. 373 (1957);
United States v. Berra, 351 U. S. 131 (1956);
Spies v. United States, 317 U. S. 492 (1942);
United States v. Foley, 290 F. 2d 562 (8th Cir. 1961);

United States v. Lee, 238 F. 2d 341 (9th Cir. 1956);

United States v. Moran, 236 F. 2d 361 (2d Cir. 1956);

United States v. Hoover, 233 F. 2d 870 (3rd Cir. 1956);

Dillon v. United States, 218 F. 2d 97 (8th Cir. 1955), cert. den. 349 U. S. 914, dism. 350 U. S. 906;

United States v. Yunker, 147 Fed. Supp. 97 (S. D. Ind. 1956).

D. It Was Not Error for the Trial Court to Admit the Testimony Pertaining to Religious Activities, Matters and Beliefs of Appellant Because Such Testimony Was Relevant and Material to Issues in the Case.

Appellant's specification 3 and argument VIII claim it was error to admit certain testimony of James A. Vaus, Jr., and W. C. Jones wherein religious activities of appellant were discussed.

We saw above that this Court's Rule 18 requires that, "When the error alleged is to the admission . . . of evidence, the specification shall quote the grounds urged at the trial for the objection and the full substance of the evidence admitted . . . and refer to the page number . . . where the same may be found." Appellant sets forth the testimony of Vaus and then the testimony of Jones that he specifies was erroneously admitted; then appellant says that this testimony was allowed into evidence in spite of the *prior* protests of counsel and counsel's willingness to stipulate to the transfers of money between the parties.

The record shows that there was not one objection to Vaus' testimony about appellant's religious affairs [R. T. 686-737; 780-783]. So there was no *prior* protest to this testimony. There were objections made to Jones' testimony about appellant's religious affairs [R. T. 762, 770-772].

Appellant obtained substantial amounts of money from the evangelists: Vaus, Jones and Blythe, and the religious matters, beliefs, and activities of appellant, whether sincere or put-on, were inextricably involved in these financial transactions. Appellant does not assign Blythe's testimony on religious activities as error.

Appellant told Skelton that he had received \$15,000 for sitting in the audience at Madison Square Garden

for Billy Graham, and that if he had been converted to Christianity he would have received \$25,000.00 [R. T. 3474-3475]. Appellant also told Jennings that the Billy Graham organization had promised him \$15,000.00 to turn Christian publicly; that he did go to Madison Square Garden and was paid \$10,000.00; and that he had an offer from the Billy Graham organization to go on a national tour that would net him about \$50,000.00 a year [R. T. 5731-5734]. Appellant also told Jennings that with the exception of Blythe, he didn't consider he owed the evangelists anything; they had been using him for their own purposes and he therefore felt he didn't owe them anything [R. T. 5734].

The evangelists denied that appellant had ever been paid or that there had ever been any offer of payment to appellant for a public conversion [R. T. 734]. Appellant testified that he did not know if Jones tried to promote him, but he did not promote Jones [R. T. 7418-7419].

Appellant interjected religion throughout his financial manipulations. Compare and contrast the following situations: appellant and the evangelists; appellant and Krause at a Jewish religious ceremony [R. T. 1290-1292]; appellant's explanation of his affiliation with the greenhouse that he made to collection officers [Ex. 587]; appellant and Hecht raising money for Israel, and appellant's possession of the Bible and silver box containing dirt from Israel [R. T. 7144-7148; 7414-7415].

Appellant quoted his trial counsel's objection (if it is in fact an objection) which was made at the side-bar, and immediately following this the court cautioned, as

distinguished from ruled, "Don't go into too much detail with it. Let's shorten down the detail." Government counsel then said:

"I will, except there is one area that is going to be gone into even more particularly on it, your Honor, because the government is prepared to show that (appellant) was involved in a confidence game to obtain money from these people and the money so obtained is income" [R. T. 762].

After Vaus and Jones testified, appellant moved to strike their testimony; the government opposed the motion; the court denied the motion; and at the time of this ruling the government's position was stated [R. T. 805-809].

Nowhere in the trial record is there any discussion or reference or value judgment made as to comparative religion; no religion was compared or contrasted with any other religion; and religion was in no way utilized as a criterion or standard for credibility.

Appellant was shown to be a confidence man who secured money from others by various devices and misrepresentations and religion was just one of them. Judge Boldt at the time of sentencing observed:

"The fact that (appellant) ingratiated himself into at least a speaking acquaintance with a number of prominent and respectable people and that he used them and their names in effecting his frauds does not minimize his misconduct in which neither religion, patriotism or friendship, nor human kindness, sorrow or fear were excepted by (appellant) as a means toward his unprincipled ends" [R. T. 8090].

E. The Requirements of Law That Appellant Receive Notice of the Deficiency Were Complied With.

1. The Mailing of the Notice of Deficiency Was in Compliance With the Statutory Requirements.

Appellee has set forth the details and background factors leading up to the mailing, by registered mail of notices of deficiencies to appellant and to appellant and his wife.

The issue that appellant raises here is whether or not the notices of deficiency were mailed to appellant's "last known address." If they were mailed to appellant's last known address, then under the terms of the statute this "shall be sufficient for the purposes of this chapter even if such taxpayer is deceased, or is under a legal disability. . . ." 26 U. S. C. 272 (K), 1939 Code.

On August 9, 1951, notices of deficiency were sent to appellant and to appellant and his wife by registered mail addressed to 513 Moreno Avenue, Los Angeles, California. Was this appellant's "last known address" at that time, as that phrase is legally interpreted?

Appellee contends that appellant's last known address on August 9, 1951, was 513 Moreno Avenue, Los Angeles, California. Appellant contends that appellant's last known address on August 9, 1951, was Los Angeles County Jail, Los Angeles, California.

Maxfield v. United States, 153 F. 2d 325 (9th Cir., 1946), said:

"The last known address becomes a matter of proof in each case where the question arises." (p. 326).

The following cases deal with the issue of how to apply “last known address” to the facts involved while keeping in mind the purpose of notices of deficiencies and the practical necessities dictated by the volume of the underlying subject matter: collecting taxes.

Tenzler v. Commissioner, 285 F. 2d 956 (9th Cir. 1960);

Pfeffer v. Commissioner, 272 F. 2d 383 (2d Cir. 1959);

Williams v. United States, 264 F. 2d 227 (6th Cir. 1959);

Boren v. Riddell, 241 F. 2d 670 (9th Cir. 1957);

Gregory v. United States, 57 Fed. Supp. 962.

On August 9, 1951, the following facts were evident: (1) Appellant was in the county jail; (2) Appellant had been sentenced to serve five years in the custody of the Attorney General; (3) Appellant had elected not to serve his sentence until his pending appeal was decided; (4) Between July 13, 1951, and August 9, 1951, appellant had at least two hearings before Chief Judge William Denman, U. S. Court of Appeals for the Ninth Circuit, on appellant's petition for bail pending appeal and as of August 9, 1951, there was no decision from Judge Denman (191 F. 2d 300, and this Court's own file on this matter); (5) Appellant was married since 1940 and with his wife had been living for three years at 513 Moreno Avenue, Los Angeles; (6) Appellant's wife was still living at 513 Moreno Avenue; (7) The Commissioner knew the above facts.

Appellant cites *Barack v. United States* (D. C. E. D. Mo., 1956); 56-2 USTC. para. 9961, as authority for his contention; but in that case, which is not bind-

ing on this Court, the taxpayer was *serving* his sentence in a federal penitentiary, and the letter went to his sister's home.

The fact that appellant had elected not to serve his sentence is quite significant. Rule 38(a)(2) Federal Rules of Criminal Procedure permits this election. By this election, appellant has some control over how long he may remain in the County Jail, for until either the appeal is terminated or the appellant changes his election, which he can do at any time, he can not be transferred to the penitentiary to commence serving his sentence (18 U. S. C. 3568); but he could have been transferred at any time to another similar type of institution. The Attorney General has the authority to designate the places of confinement where the sentence shall be served, but until the service of the sentence commences the prisoner is not sent to a penitentiary. 18 U. S. C. 4082, 4083, 4086. Thus at any time during the period we are concerned with, appellant could have changed his election, and would have been transferred to a penitentiary.

2. The Law Does Not Require the Government to Give Personal Notice of a Deficiency, and in Any Event the Evidence Shows That Appellant Had Personal Knowledge of the Deficiency.

Appellant first contends that the deficiency letters did not go to his "last known address," and then he contends that personal notice is necessary. The same statute that directs notices are to be mailed to last known addresses provides that if this is done it is sufficient. 26 U. S. C. 272(K), 1939 Code.

Due process does not require personal notice in every situation, and the above-quoted statute and the cases interpreting it (cited above) do not require it. However, the facts in this case compel the conclusion that

appellant know of the deficiencies and the deficiency letters. The letters were sent by registered mail and were not returned to the sender; someone of course, signed for them (it was not appellant); and one of the letters was addressed to both appellant and his wife. This Court said in *Boren v. Riddell* (*supra*):

“We presume the purpose of using registered mail is *first*, to provide the safest economical method of insuring that in the greater majority of cases, notice is actually received by the taxpayer from his Government; *second*, to create some commonly accepted factual basis to permit, in good conscience, the initiation of the ninety day period against the taxpayer, without requiring the Government to face the almost impossible task of *proving* actual notice to the taxpayer.”

Appellant's wife visited appellant in the county jail; warrants of distraint were issued on July 13, 1951 [Ex. 846]; thirteen notices of tax liens were filed on the same date; and in September of 1951 appellant's Cadillac was seized pursuant to warrant of levy and a warrant of distraint. And this activity was taking place while appellant was well represented by attorneys at law.

26 U. S. C. 272(d) (1939 Code of Internal Revenue) provides:

“(d) Waiver of restrictions. The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency.”

Appellant and his wife, in the presence and office of their attorney, on August 17, 1956, signed waivers [Ex. 848].

F. Appellant Was Not Placed in Double Jeopardy.

1. 26 U. S. C. 7201 Defines More Than One Offense.

The facts of appellant's prior conviction in 1951 are set forth by appellee above. Briefly, appellant was convicted on June 20, 1951, of three counts of wilfully attempting to evade and defeat income taxes for the years 1946, 1947 and 1948 in violation of 26 U. S. C. 145(b) 1939 Code, and one count of false statement to a government agency in violation of 18 U. S. C. 1001.

26 U. S. C. 7201 provides:

“Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.”

One offense described here is that of willfully attempting to evade and defeat income taxes, the other offense described here is that of willfully attempting to evade and defeat the payment of taxes, and these are separate offenses.

United States v. Mollet, 290 F. 2d 273 (2nd Cir. 1961);

Wilson v. United States, 250 F. 2d 312 (9th Cir. 1958); rehear. den. 254 F. 2d 391 (9th Cir. 1958); new trial granted 264 F. 2d 74 (9th Cir. 1959);

Bardin v. United States, 224 F. 2d 225 (7th Cir. 1955); cert. den. 350 U. S. 380; rehear. den. 350 U. S. 919.

See also:

Lawn v. United States, 355 U. S. 339, 361 (1958).

2. Appellant Was Not Prosecuted Twice on the Same Facts or Transactions.

Let us assume that 26 U. S. C. 7201 defines just one crime: the attempt to evade and defeat taxes, would appellant's conviction in 1951 bar his conviction here? Clearly, no. The crime he was charged with (in each of the three counts) was that he attempted to evade and defeat taxes by the affirmative act of filing a false and fictitious tax return on a date certain sometime prior to 1951. In this case the affirmative acts charged in the indictment do not include any of the acts charged in the old count.

This becomes clear when we use another statutory crime. Assume that on June 20, 1951, a man attempted to rob a bank, and he was arrested, tried and convicted for this offense; and then assume that 10 years later he again attempts to rob the same bank and was caught. Would this second prosecution be barred? Obviously, not. And this is basically what is present in the instant case.

G. The Verdict of Guilty as to Counts Five, Eight, Nine and Ten Was Supported by Substantial Evidence and Was Not Contrary to the Weight of Evidence.

Appellant's argument IX B claims that the verdict on Counts Five, Eight, Nine and Ten was not supported by substantial evidence. What we have said above in our argument V.C.6 also applies here.

Appellant concludes that the entire transcript is devoid of testimony that would in any way show an ownership interest of appellant in the Cadillacs in Counts Five and Eight. The statement of facts as set forth by appellee answers this contention. The evidence as to the way each of the Cadillacs was secured,

financed, insured, paid for, traded in on another one, and possessed, repaired, and maintained is the proof of appellant's ownership interest in the vehicles. Appellant's own trial accountant disagrees at least in part with appellant's argument, and he was put on the stand by appellant as an expert witness (*supra*).

Appellant claims there was no evidence that he had any ownership interest in the 12.69 carat diamond ring, but rather that he was a bailee, and as authority appellant cites his own testimony. It appears from appellant's testimony that: in 1948 Tiny Naylor, a sick, wealthy, big-time gambler who owned a stable of horses but didn't like to be seen going to the window to bet, owed gambling debts to his bookmaker, Bones Remmer, who was laying-off money with appellant who had a commission office; Remmer asked appellant to collect for him from Naylor, and Naylor from his sick bed told appellant he was losing money gambling and couldn't pay Remmer at the moment, but gave appellant the ring to give to Remmer; appellant told Remmer that he had the ring and Remmer told appellant to keep it in his possession and when Naylor paid his debts appellant could return the ring to Naylor. Naylor died before trial [R. T. 7095-7100, 7342].

Twelve years later, appellant still had the ring; his wife wore it for several years; he placed it with Henchel for some five years; he placed it with Gray for at least a year; and he had it pawned. Did appellant have an ownership interest in ring? The jury said he did.

Appellant does not argue that he did not have an ownership interest in the jewelry involved in Count Ten, other than to infer that, like the ring, when appellant gave it to his wife it was a gift and when his wife handed it back to appellant it was a loan. If we pursue this reasoning and show that appellant had the jewelry,

including the ring, for a specific purpose, and when the purpose was fulfilled that he regained these items and told his wife he didn't have them, what are the legal rights of the parties? And to go one step further, what happens when she divorces him and he has these items but she doesn't know it?

Appellant does not contest the value of the 12.69 carat diamond ring in Count Nine, but does question the value of the jewelry in Count Ten; the evidence shows that the diamond ring was one of the items of jewelry in Count Ten (*supra*).

H. Appellant Was Properly Convicted of Violating 18 U. S. C. 1001.

Appellant contends that a false oral denial does not constitute a statement within the meaning of 18 U. S. C. 1001.

Is that what we have here—a false oral denial? Doesn't the evidence show that appellant did more than just deny an interrogatory? His actual answers to basically the same questions were: "No, sir."; "That is absolutely correct,"; "Not one nickel"; "No, sir"; and "None whatsoever . . ." Doesn't the evidence also show that there was more than just an oral statement? Before the questioning began, appellant was told that the questions and answers would be taken down by a stenographer, who was present in the room; and that he would have an opportunity to see a copy of the transcript; the stenographer took down the questions and answers; a transcript was made; appellant was given a copy of the transcript; and appellant in a letter written to the questioner said that the transcript was correct. Of course, appellant was speaking as contrasted to writing at the time of the conference; but under all the circumstances just elucidated there was far

more than just an oral “no”, in fact since appellant was under oath it almost amounts to an affidavit.

Appellant does not concede the falsity of the “denial”; but appellee in the statement of fact set forth the proof of the falsity rather than merely contending that there was none.

Appellant quotes from a number of cases in order to support his position that the statute was intended to be restricted to written statements.

In the case of *United States v. Gilliland*, 312 U. S. 86 (1941), the court was discussing 18 U. S. C. 35, the statute out of which 18 U. S. C. 1001 evolved, and had a written false statement fact situation. The point that appellant seeks to make was not under consideration in the case.

United States v. Phillippe, 173 Fed Supp. 582 (D. C. N. Y. 1959), is distinguishable in that the statement there was not under oath, and was not reduced to a transcript which was subsequently ratified. But even were it not distinguishable, it is not binding on this court, and appellee respectfully submits that it is erroneous.

United States v. Levin, 133 F. Supp. 88 (D. C. Colo. 1953), and *United States v. Davey*, 155 F. Supp. 175 (D. C. S. D. N. Y. 1957), both support appellant's claim, and both are distinguishable on their facts from the instant case. Here, appellant was summoned for the conference; he was allowed to bring technical assistance, which he did, his Certified Public Accountant was with him and advised him; he was given a full explanation of the procedures before they began the interview; he was advised that he would be placed under oath, which he was; he was given the constitutional warning about self-incrimination. The agency involved was the Collection Division of the Internal Revenue Service.

There is a recent case in this Court that appears to answer appellant's contention.

Cooper v. United States, 282 F. 2d 527 (9th Cir. 1960). In this case the defendant in response to a question put to him by Internal Revenue agents denied, orally, that he had never received money from prostitution; he was convicted under 18 U. S. C. 1001 and this was upheld.

In *Brandow v. United States*, 268 F. 2d 559 (9th Cir. 1959), this court said:

“Regardless of any alleged factual differences, however, we decline to follow the reasoning of *U. S. v. Levin, supra*, or *U. S. v. Stark*, D. C. D. Md. 1955, 13 F. Supp. 190, neither of which is binding on this Court”

See also:

DeCasaus v. United States, 250 F. 2d 150 (9th Cir. 1957);

Knowles v. United States, 224 F. 2d 168 (10th Cir. 1955);

Cohen v. United States, 201 F. 2d 386 (9th Cir. 1953).

I. The Court Did Not Err in Denying Appellant's Motions for Mistrial.

1. Appellant Was Not Denied His Right to Counsel Because His Attorney Was a Government Witness.

The Government put Mr. Pomeranz on the stand on May 18, 1961, and he testified about a \$2,500.00 transaction he had with appellant through Jack A. Dahlstrum in 1958, wherein Pomeranz's check was made payable to Dahlstrum but its proceeds went to appellant. Pomeranz received a \$2,500.00 promissory note from Dahlstrum. [R. T. 2627-2651; Ex. 561.] Pomeranz

was eventually repaid by a money order purchased by Dahlstrum with appellant's money.

While Pomeranz was still on the witness stand, Dahlstrum requested a side bar conference as follows:

“Mr. Dahlstrum: May we approach the bench?

The Court: Certainly.

(The following proceedings were had between court and counsel at the bench outside the hearing of the jury):

Mr. Dahlstrum: We are now in that area I was afraid we might get into. This is the one financial transaction with which I had anything to do whatsoever, and I made a loan of this to Mr. Cohen, which is all in the government records. I don't see how I can keep from taking the stand. This is not the fact as he—

The Court: If you do you will have the privilege of doing that, provided you don't argue the matter in argument.

Mr. Sheridan: I was going to say on that line, I would have to put Mr. Dahlstrum on the stand myself because the records will show, and Mr. Dahlstrum's check shows, how this was handled.

The Court: I can do nothing more about it than I have already done.

Mr. Sheridan: Your check went to Cohen, there is no question about that.

Mr. Dahlstrum: That is right.”

On Friday, June 9, 1961, toward the end of the afternoon court session the Government requested a side-bar conference and the following colloquy took place.

“(The following proceedings were had between court and counsel at the bench outside the hearing of the jury):

Mr. Sheridan: For the first time in six weeks I end without any witnesses. My anticipation was that Mr. Jennings was going to take a lot longer than he did.

The Court: Do you have anybody you can use to take up the rest of the time?

Mr. Sheridan: The only one I can think of is my friend who is standing next to me, Mr. Dahlstrum. It might take me a few minutes to get his file. I don't know if I have it here or not, and I just wanted to look through it first.

The Court: And he might want to read the statement too.

Mr. Sheridan: Do you want to have an attorney here?

Mr. Dahlstrum: The only thing I will say is this, your Honor, I would like to be ordered to answer because I hate to lose the privilege of arguing on any points, even those on which I may be examined on, and I think if I was ordered to answer under the circumstances, if your Honor is so inclined, that I have the privilege to argue the case in its entirety rather than have to bow out of some three or four little points.

The Court: I don't want to anticipate this, but I suspect that I would permit you to speak of this subject but not to argue your own credibility.

Mr. Dahlstrum: I won't argue credibility.

The Court: If any issue of that kind is involved or the bona fides of the transaction or anything of that kind, but I can't judge what it is because I don't know anything about what it is. I will order you, though, I will do it now and I will command you to respond, and if that helps the situation from your point of view I have no hesitancy in doing it at all.

Mr. Dahlstrum: I didn't want to lose the privilege of arguing any portion of the case.

Mr. Sheridan: When you say 'argue' are you referring to the closing argument?

Mr. Dahlstrum: Yes.

Mr. Sheridan: No problem there.

One thing further, how do you wish to handle the cross-examination of yourself?

Mr. Dahlstrum: I will just speak where I think it is necessary. I will just speak and you can object if I do something you think is out of line.

The Court: All right.

Mr. Sheridan: I might need a minute or two to check my files." [R. T. 5895-5896.]

Mr. Dahlstrum was then called as a witness, was sworn, and testified. His entire testimony is covered in 13 pages. [R. T. 5898-5911.] Dahlstrum never objected as such to taking the stand.

On Monday, June 12, 1961, before court began there was a conference in Judge Boldt's chambers, outside of the jury's hearing; the following transpired.

"Mr. Dahlstrum: Secondly, if the court will recall, I was concerned when I was subpoenaed about being precluded from arguing the case or any portion of it, and—

The Court: I don't see any occasion on the basis of the testimony given, Mr. Dahlstrum, to be concerned about it at all.

Mr. Dahlstrum: We talked about it, you will recall.

The Court: Yes.

Do you, Mr. Sheridan?

Mr. Sheridan: I don't know what phase of the argument or what he is talking about.

Mr. Dahlstrum: It occurred to me that now my credibility is at issue and I wonder if I can effectively argue the case, my credibility having been put in issue as a witness in the case now.

The Court: I don't think there is any problem to it at all. You have *carte blanche* to argue on the basis of the evidence as fully as you would wish, as if it hadn't come out from you at all.

Mr. Dahlstrum: Well, the only thing, as I say, concerning my testimony is that my credibility is in issue and if I stand up and start arguing the case whether it has been put in issue, my having been subpoenaed as a witness. It seems to me that it is.

On reflection over the weekend, and consequently to protect the record, I think I better move for a mistrial, since that has been done, that I was subpoenaed as a witness—I was not subpoenaed, excuse me—because I was called as a witness and ordered to answer and now I am worried about the effect of my credibility, having been put in issue in the case, as it affects the whole position of me as counsel for the defendant in the matter with the jury, and I would move the court for a mistrial on it. It concerns me greatly.

Mr. Sheridan: Let me say, if I may, this much, that Mr. Dahlstrum of course knew long before he took the defense of the case that he was going to be a witness in this case. I personally told him long before he was to be the sole trial counsel for the defense, that he was a witness in the case. We talked at some length prior to the trial about stipulating to his testimony one way or another, and it did not work out that we ended up stipulating to his testimony, but it is not an eleventh hour situation, is the opinion I am trying to convey.

Mr. Dahlstrum was called before the grand jury, he testified of course before the grand jury, we have an affidavit from Mr. Dahlstrum that whatever the date is on the affidavit that is now an exhibit in the court, and he knew from the basis of the affidavit and his grand jury testimony and conversations with myself that he would be a witness in the case. This was of course prior to picking up the defense of the case.

Mr. Dahlstrum: Let me say this, I knew I gave an affidavit, certainly; I knew I was called before the grand jury, certainly; but I have been in this case since the date of the indictment, September of 1960, in one phase or another of it. I did not know that I was going to be sole trial counsel, true, nor did I know for sure in September of 1960 that I was going to be a witness.

Frankly, the relevancy of my testimony is a question in my mind alone, yes, and that was it. But to say I knew I was going to be a witness until you told me after the indictment and during the course of our conversations, you will be a witness, is more the fact of it, is that not right?

Mr. Sheridan: Yes. Without a doubt I did not tell you definitely you were going to be a witness in the trial until after the indictment came out because we had no issue until the indictment was framed. He was indicted September 16, 1960. I wouldn't by any stretch of the imagination even know the exact date that we talked, but we talked about it on a number of occasions during the pre-trial conferences.

The Court: Well, I must say that I have presumed that you were going to be called as a witness from the beginning of the trial because in the list of exhibits you are listed as a witness and the exhibit numbers are given to certain exhibits. I didn't think anything about it but I noticed it, and I assumed that sometime or other you were going to be called as a witness.

So however that may be, I have not the slightest concern about the situation that you indicate and therefore deny the motion and allow an exception. I think in my judgment there is not the remotest possibility of any difficulty arising on account of it, and I now make it plain that whatever reservations there might have been previously expressed concerning your arguing this phase of the case, I see no reason why you shouldn't argue it just as fully as you may wish and without reservation provided, or course, you remain within the record." [R. T. 5917-5920.]

From the foregoing, it appears that: (1) Dahlstrum knew far in advance of trial that he would be a witness called by the Government; (2) Dahlstrum, of his own volition advised the court that in view of Pomeranz's testimony he (Dahlstrum) would have to place him-

self on the witness stand whether or not called by the Government; (3) Prior to actually calling Dahlstrum to the stand, the Government prosecutor privately advised Dahlstrum and the court he would put Dahlstrum on the stand at that time; and (4) Dahlstrum was asked if he wanted another attorney present while he was on the stand, and he declined.

In view of these factors, appellant's claim must fail. It should also be pointed out that Dahlstrum was personally mentioned by other witnesses, both before and after he testified:

See:

Testimony of Feigenbaum at
[R. T. 1565-1576];

Testimony of Pomeranz at
[R. T. 2635-2651];

Testimony of Bieber at
[R. T. 2116; 2121; 2151];

Testimony of Lebby at
[R. T. 3237-3239];

Testimony of Brody at
[R. T. 4130; 4145; 4149-4151; 4181]; and

Testimony of Jennings at
[R. T. 5710; 5716].

Neither side in fact argued Dahlstrum's testimony during their closing arguments or at any other time during the trial.

Also, during the trial some twenty attorneys at law were called as witnesses for the Government, and they testified, just as Dahlstrum did, about their financial transactions with appellant.

It appears to appellee that from the quoted portions above that appellant's motion for mistrial and his argument here fall into the category of "invited error," and we urge this court to do as the trial court, politely decline the invitation.

The case of *People v. Lathom*, 192 A. C. A. 239 (1961), is distinguishable and wholly inapplicable to this case.

2. The Court Did Not Err in Denying Appellant's Motions for Mistrial Based on Newspaper Publicity.

The test as to whether or not a mistrial should be granted on the grounds of newspaper publicity is whether or not it had any impact upon the minds of the jurors that was prejudicial to appellant; and this is a matter that rests within the sound discretion of the trial judge.

Yates v. United States, 225 F. 2d 146 (9th Cir. 1955);

Marshall v. United States, 360 U. S. 310 (1959);

United States v. Postma, 242 F. 2d 488 (2d Cir. 1957);

Jolly v. United States, 232 F. 2d 83 (5th Cir. 1956);

United States v. Penna, 229 F. 2d 216 (7th Cir. 1956);

Briggs v. United States, 221 F. 2d 636 (6th Cir. 1955);

Cohen v. United States, 201 F. 2d 386 (9th Cir. 1953).

At the start of trial in the instant case the Court at some length admonished the jury about reading communications of any kind, including newspapers. Thereafter, during the course of the trial, which lasted some 42 days, the Court renewed the admonition at least sixty-nine times.

After the return of the verdict the Court specifically asked the jurors whether they had seen or read any written or published item in any way referring to appellant or the case between the time the case was submitted to the jury and the return of the verdict. Not one juror had seen such material [R. T. 8067-8068].

The Court then went on to say:

“I take it then from the fact that none of you rise or make it known that each of you individually, on your oath as a juror and as a citizen of the United States, now informs the Court and affirms as a fact that he or she has not seen any published or written item of any nature relating to the defendant or to this case other than the exhibits in the case. Is that correct? Do you also affirm?

(Assent.)

Let the record show this, please.”

This inquiry of the judge was also supported by the careful questioning by Judge Boldt of the bailiff prior to the return of the verdict, and it shows not only didn't the jury read or see the material but that it was impossible for them to have seen it under the circumstances.

Thus, there is no showing that the jury read the publications or that the jury was in any way prejudiced by any publicity of any kind. Furthermore, there is no showing of an abuse of judicial discretion in this matter.

VI.
CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment and sentence of the Court should be affirmed.

Dated: Los Angeles, California, October 28, 1961.

FRANCIS C. WHELAN,
United States Attorney,

THOMAS R. SHERIDAN,
*Assistant United States Attorney,
Chief, Criminal Division.*

Attorneys for Appellee.

APPENDIX.

- Exhibit 1—Summary of Life Story Transactions
- Exhibit 2—Life Story Transactions—Ruth Fisher
- Exhibit 3—Life Story Transactions—George Bieber
- Exhibit 4—Life Story Transactions—Charles
Schneider
- Exhibit 5—Life Story Transactions—Aubrey
Stemler
- Exhibit 6—Life Story Transactions—Bernard
Koomer
- Exhibit 7—Life Story Transactions—Leonard
Krause, M.D.
- Exhibit 8—Life Story Transactions—Louis Leitner
- Exhibit 9—Life Story Transactions—Max
Feigenbaum
- Exhibit 10—Life Story Transactions—Joseph
Bishop
- Exhibit 11—Summary of Cadillacs

APPENDIX EXHIBIT 1

Summary of Life Story Transactions.

<u>Source</u>	<u>Total Amount Paid</u>	<u>Amount of Contract</u>	<u>Contract Percent</u>	<u>Date of First Payment</u>	<u>Date of Last Payment</u>
Ruth Fisher	\$ 7,537.27	\$ 7,500.00	5%	1-17-56	9-8-58
George Bieber	10,500.00	10,500.00	5%	1-11-57	4-23-57
Charles Schneider	2,500.00	*	*	4-10-57	4-10-57
Aubrey Stemler	10,000.00	10,000.00	10%	4-23-57	5-31-57
Bernard Koomer	15,000.00	15,000.00	10%	5-6-57	7-24-57
Leonard Krause, M.D.	25,000.00	25,000.00	10%	11-4-57	3-11-58
Louis Leitner	9,750.00	35,000.00	10%	1-20-58	4-9-58
Max Feigenbaum	18,950.00	25,000.00	10%	1-20-58	6-23-58
Joseph Bishop	<u>7,500.00</u>	7,500.00	2%	4-6-58	8-21-58
	<u><u>\$106,737.27</u></u>	<u><u>\$135,500.00</u></u>			

Contracts offered by Appellant but not accepted:

Louis Fortwangler	\$15,000.00	3%
Virginia Stark	30,000.00	8%

*No written agreement provided by Appellant.

APPENDIX EXHIBIT 2

Life Story Transactions—Ruth Fisher—5%

<u>Trial Exhibit No.</u>	<u>Date On Check Negotiated</u>		<u>Amount</u>	<u>Source</u>	<u>Payee</u>	<u>Notations On Checks</u>	<u>Endorsements</u>
91	1-17-56	1-17-56	500.00	Harmon Eldridge	(Michael Cohen)	Loan to M/C	(Note from MC to Eldridge)
92	8- -57	8- -57	500.00	Ruth Fisher	(Michael Cohen)	Cash Advance	(Cash given MC by R. Fisher)
93	9- 3-57	9- 6-57	2500.00	“ “	Michael Mickey Cohen	Loan on future agreement concerning Mickey Cohen story	Michael Mickey Cohen
95	4-21-58	4-21-58	2000.00	“ “	Michael Cohen	Loan to Michael (Mickey) Cohen on future deal on motion picture prod.	Michael Cohen
97	5- 7-58	5-13-58	1000.00	“ “	Michael (Mickey) Cohen	Loan to Michael (Mickey) Cohen on future deal on motion picture prod.	Michael Mickey Cohen
102	9- 8-58	10-8-58	1037.27	Bernard Kaufman*	Ruth Fisher	For interest in Mickey picture & book etc.	Ruth Fisher/Mickey Cohen
		Total	<u>\$7537.27</u>				
100	3- 5-58	Notarized (5-16-58)	(7500.00)	Michael Mickey Cohen to Ruth L. Fisher—Prom. Note.			
101	3- 5-58	Notarized 5-16-58	(7500.00)	Michael Mickey Cohen to Ruth L. Fisher—Life Story Contract 5%.			

*Appellant had other financial transactions with Fisher.

APPENDIX EXHIBIT 3
Life Story Transactions—George Bieber—5%

<u>Trial Exhibit No.</u>	<u>Date On Check Negotiated</u>		<u>Amount</u>	<u>Source</u>	<u>Payee</u>	<u>Notations</u>	<u>Endorsements</u>
414	1-11-57	1-21-57	7500.00	George Bieber	Michael's Greenhouse	"Loan"	Michaels Greenhouses, Inc. Michael Cohen J. S. Bernstein
415	4-23-57	4-29-57	3000.00	George Bieber	Michaels Greenhouse, Inc.	None	Michaels Greenhouses, Inc., by Lillian Weiner
Total			\$10500.00				
430	2- 3-58		\$10500.00	Michael Mickey Cohen to: Bieber—Promissory Note.			
431	2- 3-58	Notarized 2-11-58	10500.00	Michael Mickey Cohen to: Bieber—Life Story Contract.			

*Appellant had other financial transactions with Bieber.

APPENDIX EXHIBIT 4
Life Story Transactions—Charles Schneider—
% Unknown.

<u>Trial Exhibit No.</u>	<u>Date On Check Negotiated</u>	<u>Amount</u>	<u>Source</u>	<u>Payee</u>	<u>Notations On Checks</u>	<u>Endorsements</u>
272	4-10-57 4-22-57	\$2500.00	Charles Schneider	Michael Cohen	"Loan made to Michael Mickey Cohen for future deal on Motion Picture of the life story of Michael Cohen"	Michael Cohen
	Total	\$2500.00				

*No promissory note or contract given.

**Appellant had other financial transactions with Schneider.

APPENDIX EXHIBIT 5

Life Story Transactions—Aubrey Stemler—10%

<u>Trial Exhibit No.</u>	<u>Date On Check Negotiated</u>		<u>Amount</u>	<u>Source</u>	<u>Payee</u>	<u>Notations</u>	<u>Endorsements</u>
239	4-23-57	5- 3-57	3000.00	Aubrey Stemler	Michael Cohen	Loan—Michael Cohen Motion Picture Enterprise	Michael Cohen/Ellis Mandel/Rush Currency Exchange, Inc.
240	5- 7-57	5- 9-57	2000.00	Aubrey Stemler	Michael Cohen	Loan Michael Cohen c/o Motion Picture Enterprise. Total investment to date—\$5000.00	
241	5-15-57	5-24-57	2500.00	Aubrey Stemler	Michael Cohen	Payment on A/C 10% interest in Mickey Cohen Motion Picture Production	Michael Cohen
242	5-15-57	5-28-57	2500.00	Aubrey Stemler	Michael Cohen	Balance due on purchase of 10% interest in Mickey Cohen motion picture	Michael Cohen/Billy Gray for deposit in Billy Gray and Shirley Gray building fund
		Total	<u>\$10000.00</u>				
251	5-31-57	—	10000.00	Letter contract from Michael Mickey Cohen to Mr. Aubrey Stemler—10% interest in life story.			

*Appellant had other financial transactions with Stemler.

APPENDIX EXHIBIT 6

Life Story Transactions—Bernard Koomer—10%

<u>Trial Exhibit No.</u>	<u>Date On Check Negotiated</u>		<u>Amount</u>	<u>Source</u>	<u>Payee</u>	<u>Notations On Checks</u>	<u>Endorsements</u>
319	5- 6-57	5-24-57	7500.00	Bernard Koomer	Michael Cohen	Advance on 15000 loan to Michael Cohen for 10% of Future Story and Motion Picture Rights to the Mickey Cohen Story	Michael Cohen
320	7-24-57	7-25-57	7500.00	Bernard Koomer	Michael <u>Choen</u>	Final payment for 10% for all rights to the Mickey <u>Choen</u> story	Michael <u>Choen</u>
Total			<u>\$15000.00</u>				
325	3-31-58	Notarized 3-31-58	15000.00	By Michael Mickey Cohen—10% Life Story Contract.			
326	May 1957 March 1958	Notarized 4- 1-58	15000.00	By Michael Mickey Cohen to Marie and Happy Koomer—Promissory Note.			

*Appellant had other financial transactions with Koomer.

APPENDIX EXHIBIT 7

Life Story Transactions—Leonard Krause, M.D.— 10%

<u>Trial Exhibit No.</u>	<u>Date On Check Negotiated</u>		<u>Amount</u>	<u>Source</u>	<u>Payee</u>	<u>Notations on Checks</u>	<u>Endorsements</u>
327	11-4-57	11-11-57	\$1500.00	Sadelle Bellows	Michael Cohen	Advance loan on Future Motion Picture Story	Michael Cohen
328	11-13-57	11-15-57	1500.00	Sadelle Bellows	Michael Cohen	Loan on Future Motion Picture Story	Michael Cohen
338	11-13-57	11-21-57	2000.00	David Krause	Michael Cohen	Loan on Future Motion Picture Story	Michael Cohen Jules Salkin
329	1- 3-58	1- 9-58	1500.00	Sadelle Bellows	Michael Cohen	Loan to Michael M. Cohen on Future Motion picture production	Michael Cohen Hotel Riviera Las Vegas, Nevada
339	1- 8-58	1-10-58	1000.00	David Krause	Michael Cohen	Loan on Future motion picture story	Michael Cohen Billy Gray
340	1-10-58	1-15-58	500.00	David Krause	Michael Cohen	Loan on motion picture story	Michael Cohen Ben Blue
330	1-18-58	2-11-58	5000.00	Sadelle Bellows	Michael Cohen	Personal loan on future M. Cohen story	Michael Mickey Cohen Michael Cohen
341	2-12-58	2-14-58	4000.00	Leonard Krause	Cash		Billy Gray
342	2-12-58	2-13-58	3000.00	Leonard Krause	Cash		Billy Gray
343	3-10-58	3-10-58	1400.00	Leonard Krause	David Krause		David Krause—pay to the order of M. Cohen for loan on picture story Michael Cohen Billy Gray
344	3-10-58	3-11-58	3600.00	Leonard Krause	David Krause		David Krause—Pay to order of M. Cohen for loan on picture story
		Total	<u>\$25000.00</u>				
357	2- 3-58		10000.00	Michael Mickey Cohen	David Krause—Promissory note		
358	2- 3-58		15000.00	Michael Mickey Cohen	Sadelle Bellows—Promissory note		
359	2- 3-58)	Notarized		"Life Story" Agreement—Cohen and Bellows "Life Story" Agreement—Cohen and David Krause			
)	2-11-58					
360	2- 3-58)						

*Appellant had other financial transactions with Krause.



APPENDIX EXHIBIT 8

Life Story Transactions—Louis Leitner—10%

<u>Trial Exhibit No.</u>	<u>Date On Check Negotiated</u>		<u>Amount</u>	<u>Source</u>	<u>Payee</u>	<u>Notations</u>	<u>Endorsements</u>
370	1-20-58	1-29-58	1500.00	Louis Leitner	Michael <u>"Micky"</u> Cohen	As a personal loan	Michael Mickey Cohen
371	1-28-58	1-29-58	2000.00	Louis Leitner	Michael <u>"Micky"</u> Cohen	Loan to Michael "Micky" Cohen on future deals on motion picture "The Micky Cohen Story"	Michael Mickey Cohen
372	2- 7-58	2- 3-58	2000.00	Louis Leitner	Michael <u>"Micky"</u> Cohen	Loan to Michael "Micky" Cohen on future deals on motion picture "The Micky Cohen Story"	Michael Mickey Cohen - - - Cashed - - - George R. Bieber
373	1-29-58	2- 3-58	500.00	Louis Leitner	Michael <u>"Micky"</u> Cohen	Personal Loan	Michael Mickey Cohen - - - Cashed - - - George R. Bieber
374	1-29-58	2- 3-58	750.00	Louis Leitner	Michael <u>"Micky"</u> Cohen	Personal Loan AX 39361	Michael Mickey Cohen - - - Cashed - - - George R. Bieber
375	4- 4-58	4- 3-58	1500.00	Louis Leitner	Michael <u>"Micky"</u> Cohen	Loan to Michael Cohen on future deals on motion pictures The <u>Micky</u> Cohen Story	Michael Mickey Cohen Edward I. Gritz 139 No. Bdway MA 69167 Michael Mickey Cohen
376	4- 9-58	4- 9-58	1500.00	Louis Leitner	Michael <u>"Micky"</u> Cohen	Personal loan to Michael Micky Cohen on future motion picture deal The <u>Micky</u> Cohen Story	Michael Mickey Cohen Carousel Ice Cream Parlor—George Weiner
Total			<u>\$9750.00</u>				
(Notarized)							
380	2- 3-58	2-11-58	Life Story Contract— <u>35000</u>				
379	2- 3-58	2-11-58	Life Story Note—35000				

APPENDIX EXHIBIT 9
Life Story Transactions—Max Feigenbaum—10%

<u>Trial Exhibit No.</u>	<u>Date On Check Negotiated</u>		<u>Amount</u>	<u>Source</u>	<u>Payee</u>	<u>Notations</u>	<u>Endorsements</u>
	1-20-58	1-20-58	1000.00	Mike Kasino	Currency to M. Cohen		
383	1-21-58	1-22-58	5000.00	Trans World Attractions	Cash		M. Cohen
73	1-21-58	1-22-58	5000.00	Mike Kasino	Mike Kasino		Mike Kasino/M. Cohen
385	1-28-58	1-29-58	1000.00	Trans World Attractions			M. Cohen
386	3-31-58	4- 2-58	2200.00	Mike Kasino	Cash		Michael Cohen
	3-31-58	3-31-58	300.00	Mike Kasino	Currency to M. Cohen		
77	4-28-58	5-13-58	2450.00 (1000.00)	Michael Cohen Max Feigenbaum	M. Cohen (W.U.M.O.)** (Cash to Feigenbaum)		M. Cohen/Jack Begun
397	6-23-58	6-24-58	3000.00		Michael Cohen (C/C)***		Michael Cohen/Alan Weiner
		Total	<u>\$18950.00</u>		Loan		
396	3- 7-58	3- 7-58	25000.00	Life Story Contract to Max Feigenbaum—10%			

*Appellant had other financial transactions with Feigenbaum.

**Western Union Money Order.

***Cashier's Check.



APPENDIX EXHIBIT 10
Life Story Transactions—Joseph E. Bishop—2%

<u>Trial Exhibit No.</u>	<u>Date On Check Negotiated</u>		<u>Amount</u>	<u>Source</u>	<u>Payee</u>	<u>Notations</u>	<u>Endorsements</u>
362	4- 6-58	4- 8-58	\$800.00	Joseph Bishop	<u>Micky</u> Cohen	Personal loan to <u>Micky</u> Cohen	<u>Micky</u> Cohen
363	5-26-58	5-27-58	6000.00	Joseph Bishop	Lillian Weiner	Loan—Guaranteed by Michael Cohen	Lillian Weiner/Carousel Ice Cream Parlor
364	6- 2-58	6- 3-58	250.00*	Joseph Bishop	Cash		Merry Go Round-Ben Blue's
365	6-15-58	6-17-58	350.00*	Joseph Bishop	Cash		(blank)
366	8-21-58	8-22-58	<u>600.00*</u>	Joseph Bishop	Ben Blue's		(stamp) Ben Blue's
			<u><u>\$7500.00</u></u>				
368	9-17-58	(no notary)	7500.00	Life Story Contract—2% Signed Michael Cohen			
367	9-17-58	(“ “)	7500.00	Promissory Note by Michael Cohen to Joseph E. Bishop			

*Out of three checks totalling \$1200.00, Bishop retained \$500.00.



APPENDIX EXHIBIT 11

Summary of Cadillacs

<u>Date Purchased</u>	<u>Purchase Price</u>	<u>Financing & Insurance Charges</u>	<u>Total Time Price</u>	<u>Financing Agency</u>	<u>Cash on Delivery</u>	<u>Vehicle Traded in & Trade Allowance</u>	<u>Total Payments on Contracts</u>	<u>Total Payments on Vehicle</u>	<u>Registration</u>
10-11-56	\$ 5,450.00	\$ 805.60	\$ 6,255.60	(1) <u>1956 COUPE DEVILLE</u> Pac. States Inv. Co.	\$1,800.00	— — — — —	\$ 566.48	\$ 2,366.48	Michael's Greenhouses, Inc.
1-30-57	8,585.74	687.30	9,273.04	COUNT 5 (2) <u>1957 EL DORADO SEVILLE</u> Pac. States Inv. Co.	1,500.00	#(1) '56 Cad-Deville Allowance \$4,700.00 Less: Pay off <u>3,340.96</u> Net Allowance <u>\$1,359.04</u>	4,939.75	6,439.75	Michael's Greenhouses Inc.
9-18-57	13,875.48	2,346.76	16,222.24	COUNT 6 (3) <u>1957 CADILLAC EL DORADO</u> BROUGHAM G.M.A.C.	—0—	#(2) '57 Cad-Seville Allowance 6,000.00 Less: Pay off <u>2,056.64</u> Net Allowance <u>3,943.36</u>	10,131.64	10,131.64	George or Lillian Weiner
3-11-59	9,116.46	933.23	10,049.69	COUNT 7 (4) <u>1959 EL DORADO BIARRITZ</u> G.M.A.C.	3,500.00	#(3) '57 Cad-Brougham Allowance 6,216.46 Pay off <u>6,882.67</u> Negative Allowance <u>\$ (606.21)</u>	2,623.53	6,123.53	Lillian Weiner
2-2-60	8,571.66	1,806.00		COUNT 8 (5) <u>1960 EL DORADO SEVILLE</u> May Finance Co.	790.34	— — — — —	1,551.10	2,341.44	Lillie Weiner

No. 17506

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DONALD ERNEST KOCH,

Appellant,

vs.

RUDOLPH ZUIEBACK,

Appellee.

BRIEF OF APPELLEE.

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TOPICAL INDEX

	PAGE
Jurisdiction	1
Statement of the case.....	3
Issues presented	6
Statutes and Regulations involved.....	7
Argument	8

I.

This is no federal question presented by appellant's complaint and, as a result, the District Court was without jurisdiction of the subject matter of the action for damages	8
A. The due process clause of the Fifth Amendment does not authorize a civil action for damages against a federal official.....	8
B. No federal question is presented under 42 U. S. C. A. §1985(3) by a civil action for damages against a federal official.....	11
C. The Universal Military Training and Service Act does not, in itself, authorize a civil action for damages against a federal official.....	14

II.

Assuming, arguendo, the existence of a federal question, appellee Rudolph Zuiback and the other named defendants are immune from a suit for damages because the acts alleged to have been performed by them were within the scope of their authority as federal officials.....	17
Conclusion	22

TABLE OF AUTHORITIES CITED

CASES	PAGE
Agnew v. City of Compton, 239 F. 2d 226.....	9
Barr v. Matteo, 360 U. S. 564, 3 L. Ed. 2d 1434, 79 S. Ct. 1335	18, 21
Bell v. Hood, 327 U. S. 678, 90 L. Ed. 939, 66 S. Ct. 773, 71 Fed. Supp. 813.....	8, 9, 10
Bershad v. Wood, 290 F. 2d 714.....	18, 19, 20
Brewer v. Hoxie School District, 238 F. 2d 91.....	12
Byrd v. Sexton, 277 F. 2d 418.....	12, 13
Collins v. Hardyman, 341 U. S. 651, 71 S. Ct. 937, 95 L. Ed. 1254	12
Cooper v. O'Connor, 99 F. 2d 135, cert. den. 305 U. S. 642, 59 S. Ct. 146.....	18, 19, 20, 22
Dargan v. Yellow Cab Co. of Pittsburgh, Pa., 346 U. S. 840, 74 S. Ct. 52, 98 L. Ed. 361.....	12
Dodez v. Weygandt, 173 F. 2d 965.....	21
Gibson v. Reynolds, 172 F. 2d 95, cert. den. 337 U. S. 925, 69 S. Ct. 1170, 93 L. Ed. 1733.....	20, 21
Gregoire v. Biddle, 177 F. 2d 579.....	12, 18, 21
Hardyman v. Collins, 80 Fed. Supp. 501.....	12, 13
Hoffman v. Halden, 268 F. 2d 280.....	9, 12, 18
Johnston v. Sarle, 245 F. 2d 793.....	9, 10
Koch v. Zuieback, 194 Fed. Supp. 651.....	2
Miles v. Armstrong, 207 F. 2d 284.....	13
Moffett v. Commerce Trust Co., 187 F. 2d 242, cert. den. 342 U. S. 818.....	12
Ocampo v. Hadisty, 262 F. 2d 621.....	18, 19, 20
Oppenheimer v. Stillwell, 132 Fed. Supp. 761.....	12
Papagianakis v. The Samos, 186 F. 2d 257.....	21

	PAGE
Snowden v. Hughes, 321 U. S. 1, 64 S. Ct. 397, 88 L. Ed. 497	13
Spalding v. Vilas, 161 U. S. 483, 40 L. Ed. 780, 16 S. Ct. 631	18
Townsend v. Zimmerman, 237 F. 2d 376.....	16
Williams v. Yellow Cab Co. of Pittsburgh, Pa., 200 F. 2d 302	12

RULES

Federal Rules of Civil Procedure, Rule 12(d).....	2
---	---

STATUTES

United States Code, Title 28, Sec. 1291.....	2
United States Code, Title 28, Sec. 1331(a).....	7, 10
United States Code, Title 28, Sec. 1332.....	10
United States Code Annotated, Title 42, Sec. 1985(3).....	7, 11, 13
United States Constitution, First Amendment.....	8
United States Constitution, Fourth Amendment.....	9, 10
United States Constitution, Fifth Amendment.....	7, 8, 9, 10, 20, 21
United States Constitution, Ninth Amendment.....	8
United States Constitution, Tenth Amendment.....	8
United States Constitution, Thirteenth Amendment.....	8
United States Constitution, Fourteenth Amendment.....	8

TEXTBOOK

32 Code of Federal Regulations, Secs. 1600 et seq.....	22
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No. 17506

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DONALD ERNEST KOCH,

Appellant,

vs.

RUDOLPH ZUIEBACK,

Appellee.

BRIEF OF APPELLEE.

JURISDICTION.

Appellant, plaintiff below, filed an action against Rudolph Zuieback, Chairman of Local Board 103, Selective Service System, Los Angeles, California, and other persons connected with the Selective Service System, praying for a declaratory judgment that the Local Board had acted illegally in its classification of appellant and that appellant was entitled to a classification of V-A and further praying for damages against the defendants, with punitive damages, for injury alleged to have been done the appellant in the course of his processing by the Selective Service System. [R. 2.]* A Motion to Dismiss appellant's Complaint For Damages and Declaratory Judgment was filed on behalf of

*R. refers to the Transcript of Record. B. indicates references to appellant's Opening Brief.

appellee, Rudolph Zuieback, the only defendant actually served in this action. [R. 17.] A Supplement to the Motion to Dismiss of the appellee was also filed in the District Court. [R. 49.] In an Opinion which now appears at 194 F. Supp. 651, *Koch v. Zuieback* (S. D. Cal. 1961), and which appears in the Transcript of Record at pages 55 to 70, judgment in the District Court was rendered in favor of appellee Rudolph Zuieback, treating the Motion to Dismiss appellant's Complaint for Declaratory Judgment as a motion for summary judgment pursuant to Rule 12(d) Federal Rules of Civil Procedure, and granting a summary judgment to the appellee and also granting appellee's Motion to Dismiss appellant's Complaint for Damages. [R. 70.] At the same time, on the Court's own Motion, a summary judgment for all defendants named, including those not served, was rendered in plaintiff's Complaint for a Declaratory Judgment and plaintiff's Complaint for Damages was dismissed as to all named defendants who had not been served. [R. 70.] Appellant filed a Notice of Appeal from the order of the District Court granting defendant's Motion to Dismiss appellant's Complaint for Damages against Rudolph Zuieback, and also from the order, on the Court's own Motion, dismissing plaintiff's Complaint for Damages as to all named defendants who had not been served. [R. 71.] Appellant did not appeal from the granting of the summary judgment in relation to plaintiff's Complaint for a Declaratory Judgment. The judgment of the District Court being a final decision, jurisdiction is conferred upon this Court by 28 U. S. C. §1291.

STATEMENT OF THE CASE.

The facts which were assumed to be true by the District Court for the purpose of rendering a decision on appellee's Motion to Dismiss appear in appellant's Complaint and, in summary, in the Opinion of the District Court. [R. 2, 55-59; 194 F. Supp. at pp. 653-54.]

It is related in appellant's original Complaint that he registered as required by law on October 21, 1948. [R. 4.] Approximately two years later he was assigned to Local Board No. 103. [R. 4.] On July 11, 1950, appellant was classified in Class I-A by Local Board 103. [R. 5.]

It is stated in appellant's original Complaint that after his classification on July 11, 1950, appellant's efforts to obtain information of the procedures for appeal were to no avail, that the defendants failed to post the names and addresses of Advisors to Registrants and/or Appeal Agents on their office bulletin board and that the Local Board did not have an official known as an Advisor to Registrants or one known as an Appeal Agent. [R. 5.]

Appellant attempted to obtain a reclassification as a conscientious objector, but he was informed that his requests were not timely and they were refused. As a result of his subsequent refusal to be inducted into the Armed Forces, appellant was convicted for his act of refusal and sentenced to a four-year term of imprisonment to be served in the United States Penitentiary, McNeil Island, Washington. [R. 5.]

On February 16, 1961, the warden of the United States Penitentiary, McNeil Island, notified appellant's Local Board that he had been received at said prison,

in order to inform the Board of his whereabouts. [R. 5.] Appellant's Complaint also contains the statement that on March 26, 1951, the Local Board mailed the appellant a notice that he had been reclassified in Class IV-F, directing the notice to his address prior to imprisonment. [R. 6.]

The Local Board inquired of the prison authorities as to appellant's status on February 15, 1955, and was informed that appellant had been released on parole on February 10, 1953 and was referred to the Chief U. S. Probation Officer in Los Angeles. [R. 6.] One day after his official release from parole supervision, the Local Board mailed a I-A classification to appellant's obsolete address; this classification was returned to the Board by the Post Office. [R. 6.]

Appellant has further alleged that the Board did not attempt to locate the plaintiff until after the ten-day appeal period had expired, at which time the Board sent plaintiff a change of address form to be returned by March 31, 1955. [R. 7.] Upon receiving the change of address form, appellant, on March 28, 1955, appeared at the Board office to ascertain why the Board still claimed jurisdiction over him although he had reached the age of 26 in 1952. At that time appellant was handed a duplicate copy of the I-A classification issued on March 9, 1955. [R. 7.]

On April 1, 1955, appellant made written protest of his previous classifications and maintained that he was entitled to either an over-age classification (V-A) or, failing that, the conscientious objector classification (I-O). Appellant further requested a hearing before the Local Board. [R. 7.]

It is alleged in the Complaint that on June 7, 1955 plaintiff had a hearing before the Local Board at which he was expressly refused assistance of an attorney and was denied the use of two witnesses he had brought with him. [R. 7-8.] Appellant alleged that he was denied the right to discuss his file and his evidence. [R. 8.] Appellant made a summary of this hearing and filed it with the Board, and the Board also filed a summary transcript. Appellant also submitted other written evidence. Appellant was classified in Class I-O on July 12, 1955. [R. 7-8.]

The remaining allegations of appellant's original Complaint on pages 8-10 of the Transcript of Record are concerned with appellant's appeal from his Class I-O classification; a two-year period until October 22, 1957 at which time appellant's classification was reopened; appellant's reclassification as I-O on December 10, 1957; the Appeal Board's decision to retain plaintiff in Class I-O on March 23, 1958; appellant's classification in Class III-A; and appellant's reclassification in Class I-O on September 15, 1959, and, appellant's final classification in Class I-O by the Local Board, which classification the Appeal Board "again did not disturb". [R. 8-10.] Throughout appellant's complaint appear allegations that appellee's actions, and those of the other named defendants, were maliciously motivated. The course of appellant's various classifications and his protests relating thereto are summed up in the Opinion of the District Court on page 654, 194 F. Supp. and on pages 58 and 59 of the Transcript of Record.

On November 17, 1960, appellant filed a Complaint entitled Civil Action: For Damages and Declaratory Judgment seeking a declaratory judgment that the Local

Board had acted illegally in classifying appellant and declaring that appellant is entitled to a classification of V-A, and praying for both damages and punitive damages. [R. 2.] Appellee Rudolph Zuieback, the only defendant served, filed a Motion to Dismiss on January 24, 1961. [R. 17.] Appellee's Motion was treated as a motion for summary judgment in relation to plaintiff's Complaint for Declaratory Relief, and a summary judgment was granted appellee and all defendants named on the ground that the issue as to appellant's appropriate classification was moot. [R. 60, 70.] Appellee's Motion to Dismiss the Complaint for Damages was also granted. [R. 70.] On the Court's own motion, plaintiff's Complaint for Damages was dismissed as to all the named defendants not yet served. [R. 70.]

ISSUES PRESENTED.

1. Does appellant's Complaint present a federal question, thereby granting the District Court jurisdiction of the subject matter of the action for damages?

2. Assuming, *arguendo*, the existence of a federal question, are appellee Rudolph Zuieback and the other named defendants immune from a suit for damages because the acts alleged to have been performed by them were within the scope of their authority as Federal officials?

STATUTES AND REGULATIONS INVOLVED.

United States Code Annotated, Constitutional Amendment V, insofar as is pertinent to this proceeding, provides as follows:

“No person . . . shall . . . be deprived of life, liberty, or property, without due process of law; . . .”

42 U. S. C. A. §1985(3), in relevant part, provides as follows:

“If two or more persons in any State or Territory conspire * * * for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; * * * in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.”

28 U. S. C. §1331(a) provides as follows:

“(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.”

ARGUMENT.

I.

This Is No Federal Question Presented by Appellant's Complaint and, as a Result, the District Court Was Without Jurisdiction of the Subject Matter of the Action for Damages.

A. The Due Process Clause of the Fifth Amendment Does Not Authorize a Civil Action for Damages Against a Federal Official.

It would appear from appellant's Opening Brief that he has abandoned any attempt to rest the subject matter jurisdiction of this proceeding on the First, Ninth, Tenth, Thirteenth or Fourteenth Amendments to the United States Constitution. Those amendments were alleged as bases for jurisdiction in appellant's Complaint. [R. 2-3.] The issue whether subject matter jurisdiction of this action could be based on the First, Ninth, Tenth, Thirteenth or Fourteenth Amendments was decided in the negative, as set forth in the Opinion of the District Court. [R. 61-62; 194 F. Supp. pp. 655-656.]

The sole remaining constitutional amendment upon which appellant appears to rely is the Fifth Amendment, more precisely the due process clause of the Fifth Amendment. It is clear that in a case such as the present where recovery is sought for alleged violations of amendments to the United States Constitution, the trial court, before deciding the ultimate question of jurisdiction, at least has jurisdiction to examine the Complaint to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States. *Bell v. Hood*, 327 U. S. 678, 681-685, 90 L. Ed. 939, 66 S. Ct. 773 (1946), *Ibid.* 71 F. Supp. 813

(S. D. Cal. 1947); *Agnew v. City of Compton*, 239 F. 2d 226, 229 (9th Cir. 1956); *Hoffman v. Halden*, 268 F. 2d 280, 288-289 (9th Cir. 1959). The District Court in the present case correctly assumed the limited jurisdiction necessary to determine the existence of a federal question. [R. 61; 194 F. Supp. at p. 655.]

In reaching the inevitable conclusion that the due process clause of the Fifth Amendment does not authorize a civil action for damages against a Federal official, the District Court relied on *Bell v. Hood*, 71 F. Supp. 813 (S. D. Cal. 1947) and *Johnston v. Earle*, 245 F. 2d 793, 796 (9th Cir. 1957). *Bell v. Hood* was an action for damages against special agents of the Federal Bureau of Investigation for damages resulting from alleged violations of the Fourth and Fifth Amendments. The matter was remanded to the District Court by the United States Supreme Court for the purpose of the District Court determining whether or not the Complaint was drawn so as to claim a right to recover under the Constitution and laws of the United States. *Bell v. Hood*, 327 U. S. 678 (1946). In deciding in the negative the issue of whether a federal question had been presented, it was held that the Fourth and Fifth Amendments limit only federal action and not action by the states or by individuals. Insofar as the special agents had exceeded their authority and acted outside of the scope of their authority as federal officers, they had acted not as federal officers but as individuals and would be unable to avail themselves of the doctrine of sovereign immunity. But in the *Bell* case, as in the present case, "inasmuch as the prohibitions of the Fourth and Fifth Amendments do not apply to individual conduct, the amendments themselves, when

violated, cannot be the basis of any cause of action against individuals.” 71 F. Supp, at p. 817.

The decision of the District Court in *Bell v. Hood* was cited with approval by the Court of Appeals for the Ninth Circuit in the course of deciding a case involving the seizure of property by federal officers, finding that the Fourth and Fifth Amendments did not grant the court jurisdiction of the subject matter. *Johnston v. Earle*, 245 F. 2d 793, 796 (9th Cir. 1957). In the *Johnston* case the court was called upon to determine whether the tortious taking of property by federal officials acting beyond the scope of their authority, undoubtedly a tort cognizable in a state court, also creates a cause of action cognizable in the United States District Court because it is alleged that the action violated the Fifth Amendment.

The primary question in the present appeal is the issue of the existence of a federal question. In the event that no federal question is presented, there is no necessity of deciding the question of scope of authority and the subsequent immunity of the appellee. [R. 69; 194 F. Supp. at p. 659.] If no federal question is presented which brings the case into the purview of the jurisdiction granted by 28 U. S. C. §1331(a), the only other possible basis for the jurisdiction of the District Court would be diversity of citizenship, as granted in 28 U. S. C. §1332. Appellant’s original Complaint did not allege that the District Court obtained jurisdiction because diversity of citizenship exists between appel-

lant and appellee. As a matter of fact, appellant stated specifically that he is a resident of the Southern District of California. [R. 3, Paragraph I(5) of the First Cause of Action.] It is also clear from the Complaint that the various named defendants, served or otherwise, are also residents of California. The Complaint on its face therefore clearly indicated that diversity of citizenship does not exist. In the event, therefore, that there is no federal question basis for the District Court's jurisdiction, the federal District Court was not the proper forum for appellant to sue the appellee and the other named defendants for damages, even assuming a decision favorable to appellant on the question of immunity of the appellee and the other named defendants as federal officers.

B. No Federal Question Is Presented Under 42 U.S.C.A. §1985(3) by a Civil Action for Damages Against a Federal Official.

Appellant continues to rely on 42 U. S. C. A. §1985(3) as a basis for federal question jurisdiction in the present case. (B. 14-15.) The applicability of this section to the present case was extensively and thoroughly considered, and finally rejected, in the Opinion of the District Court. [R. 63-69, 194 F. Supp. 656-659.] The Opinion of the District Court contains an extensive discussion of the history and rationale behind what is clearly the present rule. The overwhelming weight of authority is that in order for Section 1985(3) to serve as a basis for a cause of action

for damages, at least some of the persons conspiring must be acting under color of state law.

Hoffman v. Halden, 268 F. 2d 280, 291 (9th Cir. 1959), and cases collected at p. 291, note 8;

Byrd v. Sexton, 277 F. 2d 418, 423-424 (8th Cir. 1960);

Brewer v. Hoxie School District, 238 F. 2d 91, 104 (8th Cir. 1956);

Williams v. Yellow Cab Co. of Pittsburgh, Pa., 200 F. 2d 302, 307 (3rd Cir. 1952) cert. den. *Dargan v. Yellow Cab. Co. of Pittsburgh, Pa.*, 346 U. S. 840, 74 S. Ct. 52, 98 L. Ed. 361;

Moffett v. Commerce Trust Co., 187 F. 2d 242, 247 (8th Cir. 1951), cert. den. 342 U. S. 818 (1951);

Gregoire v. Biddle, 177 F. 2d 579, 581-582 (2d Cir. 1949);

Oppenheimer v. Stillwell, 132 F. Supp. 761, 763, (S. D. Cal. 1955);

Hardyman v. Collins, 80 F. Supp. 501, 506-507, (S. D. Cal. 1948), see, also, *Collins, v. Hardyman*, 341 U. S. 651, 655, 659, 661, 71 S. Ct. 937, 95 L. Ed. 1254 (1951).

Appellant concedes that "color of federal action rather than state action is involved, . . ." (B. 14.) It is clear from the Complaint itself that all of the acts alleged to have been performed by the appellee and by the other named defendants were acts committed either as federal officials, under color of federal

law, or as individuals. None of the acts alleged could possibly be deemed state action or be deemed to have been performed under color of any state authority. As a result 42 U. S. C. A. §1985(3) can not be utilized by appellant to provide federal question jurisdiction for his suit.

In addition to the limitation that the acts performed must be performed under color of state law, 42 U. S. C. A. §1985(3) has been limited additionally in that a right of action for damages pursuant to the statute may be maintained only if the rights allegedly infringed fall within the category of rights “inherent in federal citizenship”.

Snowden v. Hughes, 321 U. S. 1, 6-7, 64 S. Ct. 397, 88 L. Ed. 497 (1944);

Byrd v. Sexton, *supra*, 277 F. 2d 418, 424 (8th Cir. 1960);

Miles v. Armstrong, *supra*, 207 F. 2d 284, 286 (7th Cir. 1953);

Hardyman v. Collins, *supra*, 80 F. Supp. 501, 504 *et seq.* (S. D. Cal. 1948).

The rights which have been held to be inherent in federal citizenship, as opposed to rights “inherent in state citizenship” or “personal rights,” include the right to assemble and petition Congress for a redress of grievances, the right to discuss national legislation and national affairs, the right to vote in national elections, the right to personal protection when in federal custody, the right to practice law before federal courts and the right to move from state to state.

Hardyman v. Collins, *supra*, 80 F. Supp. 501, 505, and cases cited.

In the instant case, the District Court declined “to categorize these rights one way or the other, except to indicate the view that they are not clearly precluded from the category of rights inherent in national citizenship”, in referring to the alleged rights which the appellee and the other named defendants have purportedly infringed. [R. 69; 194 F. Supp. at p. 659.] Appellant has alleged that his right to a fair hearing and due process of law before a federal administrative agency has been abridged and he further alleges that appellee’s acts have jeopardized his personal liberty and his right to conduct his business without harassment. Appellee here urges again the ruling of the District Court that in view of the correctness of the holding by the District Court concerning the necessity and the absence of any acts performed under color of state authority, there is no necessity, in deciding the present case, to categorize in any manner appellant’s rights which have been allegedly infringed assuming, *arguendo*, that he has correctly described existing “rights”.

C. The Universal Military Training and Service Act Does Not, in Itself, Authorize a Civil Action for Damages Against a Federal Official.

On pages 6, 13, 14, 15-18 of appellant’s Opening Brief appear the contention, and arguments pertaining thereto, that the Universal Military Training and Service Act, as such, provides a basis for federal question jurisdiction of a civil action for damages against a federal official such as the present action. The Act

as such was not invoked as a basis for federal question jurisdiction in paragraph I of appellant's Complaint, which paragraph appears to be the only one dealing specifically with the question of jurisdiction. [R. 2-3.] As a result, the District Court did not discuss the issue of federal question jurisdiction arising solely from the Act.

The reasoning on pages 13 and 14 of the Opening Brief appears to be that since Congress has declared in the Act and it is repeated in the Code of Regulations that service in the armed forces and in the reserve components thereof should be "in accordance with a system of selection which is fair and just", there is therefore a remedy in a suit for damages by any registrant who has been "harassed for years by conduct that can be shown to be malicious and beyond the jurisdiction of the board, or conduct that is a neglect of the duties of board members and of the clear and indisputable rights and privileges of the registrant, timely asserted by him, . . ." (B. 13-14.)

It is conceivable that a person might have an action in tort in state court against federal officials who have acted outside of the scope of their authority and who are not diverse in citizenship from the aggrieved person. In such a situation, the aggrieved party could use a federal forum where diversity of citizenship existed. Of course appellant in the present case is not relying on diversity of citizenship as the basis for the jurisdiction of the District Court, and the question of

the subject matter jurisdiction of the District Court must be considered entirely apart from the question of any possible immunity of the federal officials stemming from their having performed acts within the scope of their authority.

Since, if torts were committed by federal officers acting *outside* of the scope of their authority, there could be a suit for damages available to an aggrieved party either in state or federal court, depending on the existence of diversity of citizenship, in such case, the problem seen by appellant in providing a “remedy” would be non-existent. The law applicable where the officers were acting *within* the scope of their authority is set forth in Section II of this Argument.

Appellant does not, indeed cannot, point to any specific provision of the Universal Military Training and Service Act which authorizes a civil action for damages against a federal official. Federal question jurisdiction for appellant’s suit cannot be derived from the Act.

There is nothing in *Townsend v. Zimmerman*, 237 F. 2d 376 (6th Cir. 1956), cited by appellant on page 15 of the Opening Brief which would provide a basis for a suit for damages against federal officers of the Selective Service System. The *Townsend* case was an action for an injunction and did not relate to any request for damages.

II.

Assuming Arguendo, the Existence of a Federal Question, Appellee Rudolph Zuieback and the Other Named Defendants Are Immune From a Suit for Damages Because the Acts Alleged to Have Been Performed by Them Were Within the Scope of Their Authority as Federal Officials.

As stated in the Opinion of the District Court, the non-existence of a basis for federal question jurisdiction obviates the necessity of deciding whether or not the appellee and the other named defendants are immune from a suit from damages on the ground that their acts were performed within the scope of their authority as federal officers. Without federal question jurisdiction and without diversity of citizenship jurisdiction the federal District Court is not available to appellant as a forum for his action. [R. 69; 194 F. Supp. at p. 659].

Appellant has devoted a major portion of his Opening Brief to the question of immunity. (B. 6-13, 16.) Assuming, for the purposes of discussion, that a basis for subject matter jurisdiction exists, an examination of appellant's Complaint and of the law applicable thereto leads to the conclusion that the appellee and the other named defendants "acted well within the scope of their authority as outlined in the Selective Service statutes and the Regulations promulgated thereunder" and are therefore immune from a suit for damages. The cases cited by the District Court in support of its conclusion represent what is clearly the law throughout the United States. [R. 69-70; 194 F. Supp. at p. 659.]

It cannot be contested that federal officers are immune from liability for acts performed within the scope of their authority and under color of office.

Barr v. Matteo, 360 U. S. 564, 3 L. Ed. 2d 1434, 79 S. Ct. 1335 (1959);

Spalding v. Vilas, 161 U. S. 483, 40 L. Ed. 780, 16 S. Ct. 631 (1896);

Bershad v. Wood, 290 F. 2d 714 (9th Cir. 1961);

Hoffman v. Halden, 268 F. 2d 280 (9th Cir. 1959);

Ocampo v. Hardisty, 262 F. 2d 621 (9th Cir. 1958);

Gregoire v. Biddle, 177 F. 2d 579 (2d Cir. 1949).

Assuming, solely for the purposes of this discussion, that the allegation in appellant's Complaint that the motives of appellee and the other named defendants in performing the acts alleged by appellant were malicious, such malice would not strip appellee of the immunity granted him by law.

Barr v. Matteo, *supra*;

Gregoire v. Biddle, *supra*.

The test of whether the acts of any particular officer were done with the scope of his official authority and under color of his office was very clearly set forth in the decision of the Court of Appeals for the District of Columbia in *Cooper v. O'Connor*, 99 F. 2d 135, 139 (D. C. Cir. 1938), cert. den. 305 U. S. 642, 59 S. Ct. 146 (1938), as follows:

“* * *

It is not necessary—in order that acts may be done within the scope of official authority—that

they should be prescribed by statute (*United States v. Birdsall*, 233 U. S. 223, 230-231, 34 S. Ct. 512, 58 L. Ed. 930); or even that they should be specifically directed or requested by a superior officer. *Mellon v. Brewer*, 57 App. D. C. 126, 129, 18 F. 2d 168, 171, 153 A. L. R. 1519, certiorari denied, 275 U. S. 530, 48 S. Ct. 28, 72 L. Ed. 409. It is sufficient if they are done by an officer '*in relation to matters committed by law to his control or supervision.*' [Italics supplied.] (*Standard Nut Margerine Co. v. Mellon*, 63 App. D. C. 339, 341, 72 F. 2d 557, 559, certiorari denied, 293 U. S. 605, 55 S. Ct. 124, 79 L. Ed. 696; or that they have '*more or less connection with the general matters committed by law to his control or supervision.*' [Italics supplied] (*Spalding v. Vilas*, 161 U. S. 483, 498, 16 S. Ct. 631, 637, 40 L. Ed 780; and see *Lang v. Wood*, 67 App. D. C. 287, 288, 92 F. 2d 211, 212); or that they are governed by a lawful requirement of the department under whose authority the officer is acting.

* * *

The test on scope of authority and color of office in *Cooper v. O'Connor* was cited with approval and applied in *Bershad v. Wood*, 290 F. 2d 714, 717, and in *Ocampo v. Hardisty*, 262 F. 2d 621, 624-625 (9th Cir. 1958).

Contrary to the contentions on page 7 of the Opening Brief, it is presently the law that the immunity granted to officers performing acts within the scope of their authority and under color of office extends to officers well below the high policy making levels, *e.g.*, a collection officer of the Internal Revenue Service

in *Bershad v. Wood*, *supra*; local employees of the Internal Revenue Service in *Ocampo v. Hardisty*, *supra*, and an Assistant United States Attorney and a Federal Bureau of Investigation Agent, in *Cooper v. O'Connor*, *supra*.

The rule of immunity of federal officers to suits for damages for acts performed within the scope of their official authority and under color of their office has been extended to the officers of a Draft Board in *Gibson v. Reynolds*, 172 F. 2d 95 (8th Cir. 1949), cert. den. 337 U. S. 925, 69 S. Ct. 1170, 93 L. Ed. 1733 (1949). The suit in the *Gibson* case was an action against the members of a local draft board, the Selective Service Appeal Board, the State Director of Selective Service and his assistant, the Chief of the Legal Division, seeking damages for alleged improper classification of plaintiff.

The allegations of the Complaint in the *Gibson* case are quite similar to those in the present case. Those allegations were as follows:

1. That the defendants acted contrary to and in violation of the regulations concerning the classification of ministers;
2. That the defendants ignored and disregarded and failed to consider a directive from Selective Service National Headquarters concerning Jehovah's Witnesses;
3. That the defendants discriminated against plaintiff contrary to the due process clause of the Fifth Amendment to the United States Constitution, and
4. That the defendants deprived plaintiff of his procedural rights of due process to a full and fair hearing by a fair and unprejudiced Board contrary to the

due process clause of the Fifth Amendment to the United States Constitution.

The Court of Appeals for the Eighth Circuit applied the doctrine hereinabove described concerning the immunity of federal officers in affirming the order and judgment of the District Court dismissing appellant's complaint for damages against the Selective Service officials. After enumerating the many categories of officials to which immunity had already been extended, the Court discussed the absolute necessity that Selective Service officials maintain an independence of action and a "freedom from threats, duress or compulsion of any kind . . ." (172 F. 2d at p. 98). The *Gibson* case was specifically cited and followed in a case involving similar facts in *Dodez v. Weygandt*, 173 F. 2d 965 (6th Cir. 1949).

The *Gibson* case was decided contemporarily with *Gregoire v. Biddle*, *supra*, and long before *Barr v. Matteo*, *supra*. At the time of the *Gibson* decision it was, therefore, not altogether clear what effect any malice on the part of the federal officers involved would have on the immunity granted. The *Barr* and *Gregoire* cases now leave no further ground for dispute on the point. The language in the *Gibson* case which could possibly be deemed to intimate that some limitation of immunity would result under certain conditions involving malice, which language is relied on by appellant on pages 9 and 10 of the Opening Brief, was criticized at an early time and labeled an obsolete and repudiated doctrine in *Papagianakis v. The Samos*, 186 F. 2d 257, 260 (4th Cir. 1950). In following the view of the Second Circuit in the *Gregoire* case in their decision in *Barr v. Matteo*, *supra*, the Supreme Court has forever laid the question to rest.

An application of the test of scope of authority set forth in *Cooper v. O'Connor*, *supra*, to the facts of the present case shows that the acts alleged to have been done by the appellee Rudolph Zuieback and those other individual Selective Service officers named in the Complaint were clearly performed with the scope of their authority and under the color of their office. The acts alleged in the Complaint were clearly done "in relation to matters committed by law" to the control or supervision of the defendants and certainly had "more or less connection with the general matters" committed by law to their control or supervision. (32 C. F. R. §1600 *et seq.*) In order to qualify under the test set forth in *Cooper v. O'Connor*, it is not necessary that every act alleged in the Complaint be supported by a specific statute or regulation. Even so, in his Memorandum of Points and Authorities in Support of his Motion to Dismiss appellant's Complaint, appellee was able to so support the acts alleged by appellant. [R. 25-33.]

Conclusion.

It is respectfully submitted that the Judgment of the District Court, ordering the dismissal of appellant's Complaint for Damages against the appellee and the other defendants named in appellant's Complaint, should be affirmed.

Respectfully submitted,

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No. 17507-8-9 ✓

United States Court of Appeals
For the Ninth Circuit

MAX KUNEY, JR. and CONSTANCE K. KUNEY, His Wife;
MAX J. KUNEY, SR., OLIVE R. KUNEY, *Appellants*,

vs.

WILLIAM E. FRANK, District Director of Internal
Revenue, *Appellee*.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON

BRIEF FOR THE APPELLANTS

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INDEX

Page

Opinion Below	1
Jurisdiction	1
Question Presented	2
Summary of Argument.....	2
Statement	3
Argument	16
The Grantors Neither Retained Nor Exercised Controls Over the Trust Property Other Than Those Necessary to Managing Partners. The Controls Retained or Exercised by Appellants- Grantors Were Not of the Type or Degree to Allow the District Court to Reverse the Verdict of the Jury That the Trusts Were Genuine, Bona Fide and Valid Partners of the Kuney Family Partnership for Income Tax Purposes	16
Conclusion	21
Appendix.....	following page 21
Internal Revenue Code of 1939: Sec. 167.....	1A
Internal Revenue Code of 1954: Sec. 191.....	1A
Internal Revenue Code of 1954: Sec. 704.....	2A
House Ways and Means Committee Report, Sec. 340, Revenue Act of 1951.....	3A
Schedule A. Detailed Analyses of Partners' Capital Accounts January 1, 1952 Through Decem- ber 31, 1958	
Schedule B. Summary of Partners' Capital Ac- counts and Income Distribution (Per Cent) January 1, 1952 Through December 31, 1958	
Schedule C. Reconciliation of Trust Partners' Capital Accounts January 1, 1952 Through December 31, 1954, December 31, 1958 and De- cember 31, 1960	
Schedule D. Income Taxes for Years 1952 Through 1954 Computed Per Pre-Trial Order	

TABLE OF CASES

	<i>Page</i>
<i>Commissioner of Internal Revenue v. Culbertson</i> , 337 U.S. 733.....	18
<i>Commissioner v. Stern</i> , 15 T.C. 521.....	19, 20
<i>Commissioner v. Sultan</i> , 18 T.C. 715.....	19
<i>Helvering v. Clifford</i> , 309 U.S. 331.....	18, 19

STATUTES

Internal Revenue Code of 1954, Sec. 7422.....	2
28 U.S.C. 1291.....	2
28 U.S.C. 1340.....	2

House Ways and Means Committee Report, Section 340, Revenue Act of 1951.....	20
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ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON

BRIEF FOR THE APPELLANTS

OPINION BELOW

The instructions to the jury (R. 332-352) and their verdict (R. 77-78), are reported at 61 U.S.T.C. 9223. The District Court's memorandum decision and memorandum opinion are at R. 48-49 and R. 353-357, respectively.

JURISDICTION

This appeal involves Federal income taxes and interest thereon paid by Appellants to Appellee for the calendar years 1952, 1953 and 1954.

Appellants filed timely Federal income tax returns for the years 1952, 1953 and 1954 and paid the taxes shown due thereon. Thereafter, the Commissioner of Internal Revenue assessed additional income taxes and interest against Appellants, which amounts were paid. Claims for refund were filed by Appellants, within the

time provided in Sec. 7422 of the Internal Revenue Code of 1954. On February 10, 1960, Appellants brought these actions in the United States District Court for the recovery of \$45,953.71, \$22,823.10, and \$14,290.47, together with interest as provided by law, and costs of the actions. Jurisdiction was conferred on the District Court by Title 28 U.S.C. 1340. At the conclusion of the trial of these actions before a jury, a verdict was entered for Appellants. Upon Appellee's motion for judgment notwithstanding the verdict, ^{the District Court} ~~of the jury~~ was reversed the jury's verdict on March 22, 1961. The judgment notwithstanding the verdict of the jury was thereafter entered on April 25, 1961. Within sixty days thereafter, on May 19, 1961, notices of appeal were filed by Appellants. Jurisdiction is conferred on this Court by Title 28 U.S.C. 1291.

QUESTION PRESENTED

Whether or not the controls retained or exercised by grantors were sufficient under all the facts and circumstances to reverse the verdict of the jury that the trusts were genuine, bona fide and valid partners of the Kuney family partnership for income tax purposes.

SUMMARY OF ARGUMENT

The grantors neither retained nor exercised controls over the trust property other than those necessary to managing partners. The controls retained or exercised by Appellants-grantors were not of the type or degree to allow the District Court to reverse the verdict of the jury that the trusts were genuine, bona fide and valid partners of the Kuney family partnership for income tax purposes.

STATEMENT

The Commissioner of Internal Revenue determined that the income reported by Max J. Kuney, Sr. and Max J. Kuney, Jr., as trustees, for the years 1952, 1953 and 1954, representing a proportionate share of the income earned by Max J. Kuney Company, a family partnership, was attributable to Max J. Kuney, Sr. and Max J. Kuney, Jr. as individuals instead of as trustees.

For each of the years 1952, 1953 and 1954, the Appellants timely filed Federal income tax returns, and timely paid the income taxes indicated thereon. On November 20, 1957, the Commissioner of Internal Revenue determined deficiencies against Appellants for the years 1952, 1953 and 1954, which deficiencies, together with interest thereon, were paid on or about February 5, 1958. Claims for refund were filed by Appellants on the ground that the Max J. Kuney Company was a valid family partnership, consisting of the following (R. 51-53):

1. Max J. Kuney, Sr. and his wife, Olive R. Kuney, as a community (1952 only).
2. Max J. Kuney, Jr. and his wife, Constance K. Kuney, as a community (all years).
3. Max J. Kuney, Jr., as trustee for trust: John R. Kuney.
4. Max J. Kuney, Sr., as trustee for trust: Max J. Kuney III.
5. Max J. Kuney, Sr., as trustee for trust: Caroline I. Kuney.

The claims for refund before the District Court were (R. 53):

<i>Name</i>	<i>Year</i>	<i>Refund</i>	<i>Interest</i>	<i>Total Claim</i>	
Max J. Kuney, Sr.	1952	\$13,343.34	\$ 319.05	\$13,662.39	
Max J. Kuney, Sr.	1953	4,149.57	.00	4,149.57	
Max J. Kuney, Sr.	1954	3,818.48	1,192.66	5,011.14	
Olive R. Kuney	1952	13,815.48	473.99	14,289.47	
Max J. Kuney, Jr.	} {	1952	32,740.80	2,336.15	35,076.95
and		1953	5,085.09	.00	5,085.09
Constance K. Kuney		1954	4,496.32	1,295.35	5,791.67
TOTAL		<u>\$77,449.08</u>	<u>\$5,617.20</u>	<u>\$83,066.28</u>	

The income of the Kuney family partnership prior to allowance of compensation to managing partners was (R. 54):

<i>Class of Income</i>	<i>1952</i>	<i>1953</i>	<i>1954</i>	<i>Total</i>
Ordinary Income	\$419,346.59	\$85,796.42	\$ 55,571.02	\$560,714.03
Capital Gain	<u>31,078.49</u>	<u>13,807.35</u>	<u>63,352.58</u>	<u>108,238.42</u>
TOTAL	<u>\$450,425.08</u>	<u>\$99,603.77</u>	<u>\$118,923.60</u>	<u>\$668,952.45</u>

The compensation paid by the Kuney partnership to the managing partners was (R. 54):

<i>Name</i>	<i>1952</i>	<i>1953</i>	<i>1954</i>	<i>Total</i>
Max J. Kuney, Sr.	\$25,000.00	\$10,000.00	\$ 5,000.00	\$40,000.00
Max J. Kuney, Jr.	<u>25,000.00</u>	<u>10,000.00</u>	<u>5,000.00</u>	<u>40,000.00</u>
TOTAL	<u>\$50,000.00</u>	<u>\$20,000.00</u>	<u>\$10,000.00</u>	<u>\$80,000.00</u>

It was stipulated that if the jury found for the plaintiffs as to any of the years in controversy, the parties would submit computations to the court of the tax refunds due to the plaintiffs on the basis that after the payment of reasonable salaries to Max J. Kuney, Sr. and Max J. Kuney, Jr., the remaining net profits of the partnership would be divided among the partners as follows:

A. One-half thereof to be paid to Max J. Kuney, Sr. and to Max J. Kuney, Jr., as Trustee for John R. Kuney, to be divided between said two partners in the same ratio as their two capital accounts bore to each other on January first of each year; and

B. One-half thereof to be paid to Max J. Kuney, Jr. and to Max J. Kuney, Sr., as Trustee for Max J. Kuney III and Caroline I. Kuney, to be divided between said two partners in the same ratio as their two capital accounts bore to each other on January first of each year (R. 70).

Max J. Kuney, Sr., born 1894, resides at Seattle, Washington. In 1916 he was married, and from this marriage Max J. Kuney, Jr. was born in 1918. Max J. Kuney, Sr. founded the present construction contracting business in 1930. He made Max J. Kuney, Jr. an equal partner when he became 21 years of age. In 1944 Max J. Kuney, Sr. married Olive R. Kuney, and from this marriage John R. Kuney was born in 1945 (R. 98-101).

Max J. Kuney, Jr. was married to Constance K. Kuney in 1940, and from this marriage Max J. Kuney

III was born in 1942. Caroline I. Kuney was born in 1950.

From earnings partially retained in the business, Max J. Kuney, Sr. and Max J. Kuney, Jr. had respectively \$595,000.00 and \$485,000.00 invested in the business on December 31, 1951 (R. 106). Max J. Kuney, Sr. was motivated by the natural desire to do for his son, John, then six years old, what he had done for his son, Max J. Kuney, Jr. (R. 108). He was aware that a man 57 years old should not postpone such an important matter for fifteen years until John became of age (R. 108). His desire was that John would become identified with the business of Max J. Kuney Company and be inclined to carry it on after his death (R. 108). He was advised that the only way he could transfer a portion of his partnership interest to a minor child was by placing this interest in trust. He was further advised that he himself could be trustee of such a trust, or that any other trustworthy person could be trustee. He decided that his elder son, Max J. Kuney, Jr., should be trustee because he was a responsible person and the person most capable to manage John's affairs. Furthermore, he hoped this would serve to tie these half-brothers more closely together. He considered, but rejected, naming a bank or trust company as trustee, concluding that such trustee would have insufficient interest in or knowledge of the business of Max J. Kuney Company, and that such an impersonal relationship would tend to defeat the family relationship purpose (R. 109-111). On January 1, 1952, Max J. Kuney, Sr. gave \$100,000.00 of his capital interest in the Max J. Kuney Company to Max J. Kuney, Jr., as trustee for the benefit of John R.

Kuney, to be his irrevocably and forever (Plaintiff's Exhibit No. 2, R. 369-381).

Max J. Kuney, Jr., wanted his children to become identified with the business of Max J. Kuney Company and be inclined to carry it on with him, as he himself had done with his father (R. 267). However, he did not seriously consider doing so until he was advised that Congress had enacted a law eliminating any cause for litigation (R. 263). He consulted his attorney, Mr. Witherspoon, several times prior to 1951 concerning this matter. He was also advised that the only way he could transfer a portion of his partnership interest to his minor children would be by placing their interest in trusts. He selected his father as trustee for his children because he was confident that he would not only act for their benefit in a business way, but in a personal way. Furthermore, he was fully qualified to handle the children's interests in the family business (R. 267). Therefore, on January 1, 1952, Max J. Kuney, Jr. gave \$50,000.00 of his capital interest in the Max J. Kuney Company to Max J. Kuney, Sr., as trustee for the benefit of Max J. Kuney III and \$50,000.00 of his capital interest in the Max J. Kuney Company to Max J. Kuney, Sr., as trustee for the benefit of Caroline I. Kuney, ^{to be} theirs irrevocably and forever (Plaintiff's Exhibit No. 1, R. 357-369).

The trust agreements were dated and executed by Max J. Kuney, Sr. and Max J. Kuney, Jr. February 11, 1952. The trusts direct that \$100,000.00 of the capital account of Max J. Kuney, Sr. be placed to the credit of Max J. Kuney, Jr. as trustee for John R. Kuney, and

that \$100,000.00 of the capital account of Max J. Kuney, Jr. be placed to the credit of Max J. Kuney, Sr. as trustee for Max J. Kuney III and Caroline I. Kuney, in equal amounts. The trusts provide that any or all of the income earned by the trusts may be distributed to the beneficiary by the trustee until the beneficiary reaches the age of 30 years, and that thereafter the income must be distributed by the trustee to the beneficiary. The trusts further provide that the principal may be distributed by the trustee to the beneficiary at any time and in any amounts after the beneficiary reaches the age of 21. Within these limitations the trustee has absolute discretion regarding the distribution of principal and income. The grantors have no reversionary interest in either the income or the principal of the trust. Under the management and investment provisions of the trusts, the trustees may invest any or all of the trust corpus and/or income within the usual permissive limits generally applicable to trustees. Successor trustees are the trust grantors in each case, and thereafter the Seattle-First National Bank (Plaintiff's Exhibits No. 1 and No. 2, R. 357-381).

Appropriate entries were made in the partnership books to reduce the capital of Max J. Kuney, Sr. and Max J. Kuney, Jr. \$100,000.00 each and to establish capital accounts for trust: John R. Kuney—\$100,000.00; trust: Max J. Kuney III—\$50,000.00; and trust: Caroline I. Kuney—\$50,000.00 (R. 123).

The grantors filed timely Federal and State gift tax returns for the year 1952 showing their respective gifts of \$100,000.00 and paid the gift tax due thereon (R. 54-56).

During each of the years 1952, 1953 and 1954, capital was a material income producing factor in the partnership business (R. 56). During these years cash distributions were made by the trustees to the named beneficiaries of the trusts (R. 56). Timely partnership returns of income were filed to report the income distributed to the partners, and timely fiduciary and personal returns of income were filed to report the income tax payable by the partners (R. 51). During this time the partners reported \$729,633.22 income, and after deducting all income tax refunds received, paid \$377,959.01 Federal income tax. There has never been any question on the amount of income or the amount of income tax paid (R. 191). Appellants contend that the total Federal income tax properly payable by the partners is \$316,444.57, as shown on "Schedule D, Income Tax for Years 1952 through 1954 Computed per Pre-Trial Order." The refundable difference, \$61,514.44, is less than the \$77,449.08 refunds claimed principally because \$77,449.08 includes income taxes which would be payable by the trusts and trust beneficiaries if this amount was refunded to the trusts' grantors (Schedule D, Appendix *infra*).

The parties stipulated that the books and records of Max J. Kuney Company clearly show the interests of the trusts in 1952 and thereafter (R. 131-133).

From January 1, 1952, to May 31, 1953, the trusts were partners in all the Max J. Kuney Company operations. On June 1, 1953, Max J. Kuney, Sr. and Max J. Kuney, Jr. withdrew their interest in the assets of the operating partnership, except their interest in the fixed

assets (land, buildings, machinery and equipment) owned by the partnership.

At this time Max J. Kuney, Sr. and Max J. Kuney, Jr. formed the Max J. Kuney Company Corporation. Each invested \$200,000.00 in its capital stock and \$258,443.34 and \$128,849.30 respectively in paid in or capital surplus in Max J. Kuney Company Corporation, as shown on Schedule A (Appendix *infra*). This corporation owned all the assets of the former partnership except the fixed assets, which were retained by the Kuney family partnership. The book value of the Kuney family partnership assets was then \$504,033.72, corrected to the basis of January 1, 1954, as shown on Schedule B, Summary of Partners' Capital Accounts and Income Distribution (Per Cent) January 1, 1952 through December 31, 1958 (Appendix *infra*). The effect of this reorganization was to remove the trusts capital from a large business where their total share was less than 19 per cent and place it in a smaller business where their share was approximately 45 per cent, as shown on Schedule B. This reorganization also removed the trust capital from the hazards and fluctuating income inherent in construction contracting and placed it solely in fixed assets, from which a safe and steady income could be received. Such ownership is far more acceptable to trustees in general (R. 27).

The formation of the Max J. Kuney Corporation accomplished a further purpose planned for several years. It permitted the investment of \$100,000 by the former partnership's General Superintendent and its Office Manager where \$100,000 would give them 20 per

cent interest in \$500,000 total capital stock of the operating corporation (R. 126 and R. 270).

After the formation of the operating corporation on June 1, 1953, the sole business of the Kuney family partnership has been to buy and sell fixed assets as business circumstances required, and rent them to the operating corporation (R. 127). The compensation paid by the Kuney partnership to the managing partners was adjusted accordingly (R. 128-129).

The partnership agreements of February 11, 1952 (Exhibits 24 and 25) provide that partnership income shall be distributed annually "as provided by the rules of law then effective for family partnerships . . .". The evidence shows that Max J. Kuney, Sr. and Max J. Kuney, Jr. in their capacities as grantors, trustees, and partners did at all times direct that these rules be strictly observed.

The three trusts started with \$200,000.00 capital January 1, 1952. Retained earnings increased this amount to \$260,820.48 December 31, 1954, and to \$405,958.34 December 31, 1958. The increase for each trust was slightly more than 100% over the course of seven years. The three trusts' total capital December 31, 1960, is \$475,456.44. Schedules A and B show a steady, consistent increase in trust capital from retained earnings year by year from 1952 through 1960, and over the course of nine years, an after tax increase each year averaging 15.30 per cent of original investment.

As trustee, Max J. Kuney, Jr. was not amenable to

the will of Max J. Kuney, Jr. as grantor (R. 276), nor was Max J. Kuney, Jr., as trustee, amenable to the will of Max J. Kuney, Sr. as grantor (R. 117), nor was either amenable to the will of the other in any capacity whatsoever. The Kuneys, as grantors and trustees, considered that strict observance of the trusts' regulations was very important. They were well aware that neither of them should feel required in any way to abide by the other's decisions in trust matters. In at least one important matter, the use of family partnership property in Seattle, Max J. Kuney, Jr. refused to follow the will of Max J. Kuney, Sr. because of the ill effect he thought it would have on the trust of which he was trustee (R. 277-278).

Changes in the income, retained earnings, and capital of all the partners for all years 1952 through 1956 were required by the acceptance of minor changes made by Internal Revenue Agent Francis A. Carney in rental charged by the partnership to the corporation in 1953 and 1954. When partnership income must be distributed in proportion to capital investment, a change in such income, even though it be for one year only, unavoidably results in changed income, income tax liability, retained earnings and capital for every year thereafter. The record in this case shows that income tax returns were amended and re-amended, and that books were corrected and re-corrected because of the strict observance of the rules governing family partnerships. The decision to confine the investment of trusts capital to fixed assets only, after June 1, 1953, was partially motivated by the fact that such a business arrangement would be applauded by the Internal Revenue Service.

At the inception, and prior to the official existence of Max J. Kuney Company Corporation, a stock certificate for 400,000 shares was printed in the name of "Max J. Kuney Company, General Partnership." This certificate was never issued nor recorded on the corporate books or elsewhere, but was canceled and left with the corporate records. Proper certificates issuing 200,000 shares (\$200,000) each to Max J. Kuney, Sr. and Max J. Kuney, Jr. were issued and recorded in the corporate books under the official date of the formation of the Corporation, June 1, 1953.

Appellants' witness, James M. Henry, testified that he had written all the contract bonds for the Max J. Kuney Company partnership and the Max J. Kuney Company Corporation since 1940, and that he was advised that the trusts had become partners in the latter part of January, 1952. Appellants' witness, Edward A. Coon, testified that he had been Vice-President in charge of the Commercial Loan Department of the Seattle-First National Bank in Spokane and, as such, had handled all the loans made to the Kuney interests since 1950. He testified he was advised that the trusts had become partners in the early Spring of 1952, and stated that the annual financial statements regularly received from Max J. Kuney Company thereafter clearly revealed the existence of these trusts as partners of the family partnership. In their testimony witnesses Henry and Coon both stated that all contract bonds and all loans of Max J. Kuney Company had been made by the institutions which they represented, and that therefore all creditors were made aware of the existence of the trusts as partners in the Kuney family partnership.

The trust instruments, Federal and State gift tax returns, Federal and State income tax returns, and the financial statements of the Company, all of which were timely and properly filed, revealed the existence of the trusts as partners in the family partnership, and in some cases revealed the amount of their respective capital accounts (R. 198, 215).

Schedule A is a detailed analysis of partners' capital accounts showing correct distribution of income January 1, 1952, through December 31, 1958, computed in proportion to each partner's capital investment in the partnership, and as stipulated in the pre-trial order (R. 70). Schedule A, together with Schedules B and C, shows the actual performance of the trust partners and is presented as the best evidence in that respect. These schedules show a steady, consistent increase in trust capital from retained earnings year by year from 1952 through 1960, and over the course of nine years, an after tax increase each year averaging 15.30 per cent of the original investment.

Upon the District Court's instructions on the law and upon consideration of all facts and circumstances, the jury rendered verdicts that the status of Max J. Kuney, Sr. and Max J. Kuney, Jr., in their trustee capacities as partners in the Kuney family partnership, was genuine, bona fide and valid for income tax purposes.

In rendering its decision on the Appellees' motion for judgment notwithstanding the verdict of the jury, the court stated as follows:

Under the portion of the charge to the jury reported at Pages 297 and 298 of the transcript,

to which no exception was taken by either plaintiffs or defendant, the matter of bona fides in the creation of the trust in question is the matter to be determined on the over-all showing presented by the evidence on consideration of the several specific factors referred to in the instructions :

1. Retention of controls, either direct or indirect by donor over income distributions, assets essential to partnership business, management powers, et cetera ;
2. Indirect control exercised by the donor through either a separate business enterprise trust, et cetera ;
3. Participation in the partnership by the donee. In this instance, of course, the trustee.
4. The manner of making partnership income distributions ;
5. The actual manner in which the partnership business was conducted ;
6. Control of business properties, assets, et cetera ;
7. The reasonableness of salary and other compensation paid to the partners.

Conceding that in the record there is some evidence not inherently incredible which might support a fact finding favorable to plaintiffs on one or more of the facts referred to, it appears clear to me that a finding favorable to plaintiffs on the vital element pertaining to retention and exercise of control, referred to in two or three of the factors, is positively negatived by the evidence, and there is no evidence whatever to support the finding favorable to plaintiffs as to those elements. A finding adverse to plaintiffs as to a factor or two of only

incidental importance might not and probably would not preclude a general verdict in favor of the plaintiffs as a matter of law. On the other hand, when a basic general issue must be determined in the light of findings on several factors of varying significance and importance, that now being established as the law of this particular case, and vital factors pertaining to the issue are negative and the Court has the clear and firm conviction that the evidence as a whole is not sufficient to sustain plaintiffs' affirmative burden of proof on that basic issue, it is the duty of the Court to set aside the verdict as not supported by substantial evidence and to grant a judgment for defendant notwithstanding the verdict.

The District Court agreed with the findings of the jury on all factors except numbers 1, 2 and 6 quoted above.

ARGUMENT

The Grantors Neither Retained Nor Exercised Controls Over the Trust Property Other Than Those Necessary to Managing Partners. The Controls Retained or Exercised by Appellants-Grantors Were Not of the Type or Degree to Allow the District Court to Reverse the Verdict of the Jury That the Trusts Were Genuine, Bona Fide and Valid Partners of the Kuney Family Partnership for Income Tax Purposes

An analysis of the evidence shows that the only testimony which could possibly have "positively negatived . . . a fact finding favorable to plaintiffs" was the testimony of Harold V. Bowen.

Witness Bowen testified that the trustees have the power to distribute income from the trusts to the bene-

ficiaries “and by that discretion, they do directly control in a way what this percentage (44%) will be—” (R. 233, Court’s Ex. 2). The District Court’s comment at this point was “Well, that is the point, that is the question, they could if they chose to exercise it?” This comment (R. 233) indicated this must be the first of two or three vital elements of control referred to in the Court’s decision.

The second element of control referred to by the District Court (R. 233-234) was in connection with witness Bowen’s testimony that the adult Kuneys could take part or all of their \$740,000.00 and invest it in fixed assets in the partnership so as to change “this percentage (56%).”

The third element of control referred to by the District Court (R. 239-240) was that the adult Kuneys “did control the sale and exchange of fixed assets—as dictated by business circumstances.”

The first negative element found by the District Court (R. 233) is merely the power of the trustee to distribute trust income from the trust to the trust beneficiaries. This is a power of the trustee and not of the trust grantor. It is a perfectly legitimate, usual and necessary power for the trustee to have and to exercise.

The second negative element found by the District Court (R. 233-234) is the power of a partner to invest capital in the partnership. In this case, the power was no greater or less for one partner (trust grantor) than it was for the other (trustee). The power to determine total partnership investment was necessarily exercised by the managing partners (trust grantors). The amount

of capital invested by the trust partners from year to year was and is the amount of their retained earnings, and the amount of capital invested by the other partners was and is the amount required to equal the total partnership capital invested. The proportionate share of each partner's income was to be "as provided by the rules of law then effective for family partnerships" (Exhibits 24 and 25) and the percentage factor is a matter of simple arithmetic.

The third negative element (if there was a third) found by the District Court could only be that referred to at R. 239. This is merely the power to buy and sell partnership property common to all these partners. This power, necessarily exercised by the managing partners (trust grantors), is included in the second element and covered in the comments above.

The Supreme Court has advised that family partnership cases are essentially factual. *Commissioner of Internal Revenue v. Culbertson*, 337 U.S. 733. As such, previously decided cases are not particularly helpful, but it may be pertinent to note that there has never been a case where the decision has been against the trust grantors because of the type and degree of controls found by the District Court in the present case.

Appellee cited the "*Clifford Case*"* in its motion for judgment. In that case the trust provided for the corpus to revert to the grantor in five years, and permitted the grantor to not only control the income as trustee but to use it for his own support. These were the "elements of control" which decided that case against Clifford, the

**Helvering v. Clifford*, 309 U.S. 331.

taxpayer trust grantor. In the present case no part of the trust corpus can ever revert to the grantor and no part of the trust income is under the control of the grantor and no part of it can be used for his support. The factual differences between the trusts in the present case and that in the *Clifford* case are so wide that need for any extended discussion is unnecessary.

In the case of *Commissioner v. Sultan*, 18 T.C. 715, the Court found that the trust corpus and income was to go to grantor's wife if the trust beneficiary died before reaching age 30, the trustee partner was required to obtain grantor's consent to trust investments during grantor's life, and was not allowed to transact partnership business nor incur partnership obligations, nor sell or dispose of trust property, nor withdraw from the partnership nor transact partnership business and incur partnership obligations. The trustee partner was compelled to retain his investment in the partnership unless the grantor permitted otherwise, and was thereby compelled to retain membership in a partnership in which he had no authority to transact partnership business. The degree of control found in the *Sultan* case is factually much greater than that found by the District Court in the present case. However, in the *Sultan* case it was held: "Grantor did not have any substantial control over, or interest in, the corpus or income—," and on this basis the Court decided in favor of the grantor taxpayer.

In the case of *Commissioner v. Stern*, 15 T.C. 521, the taxpayer was the general partner and four trusts for the benefit of his wife and three children were limited

partners. In that case the taxpayer-grantor was the trustee of the trusts that he created and “chose to use trusts rather than transfer the interests directly to his wife and children so that he could retain control over the business” On the matter of control which remained in the grantor in the *Stern* case, the Court said: “He retained entire control in himself but that is of no particular significance since limited partners normally have no part in the control or management of the business.” On that basis the Court decided in favor of the grantor-taxpayer.

The House Ways and Means Committee Report (Section 340, Revenue Act of 1951) Appendix *infra* states:

“Substantial powers may be retained by the transferor as a managing partner or in any other fiduciary capacity which, when considered in the light of all the circumstances, will not indicate any lack of true ownership in the transferee. In weighing the effect of the retention of any power upon the bona fides of a purported gift or sale, a power exercisable for the benefit of others must be distinguished from a power vested in the transferor for his own benefit.”

In the present case we have independent trustees who were general partners well aware of their independence. The evidence shows they exercised their independence in at least one important matter. No part of the trust corpus can ever revert to the grantor nor to grantor's wife. No part of the trust income is under the control of the grantor, and no part of it can be used for his support or for the support of his wife. The trustee partners have unlimited authority over trust investments,

the partnership business and the partnership obligations. The trustees may withdraw from the partnership at any time and are not compelled to retain investments in the partnership. The trustees have the same management powers in the partnership as the grantors do and have complete control of the trusts. The grantors have retained no power whatsoever over the trusts which they created. *The most that can be made out of controls retained by grantors of trusts in family partnership cases is that they are tests of good faith, but only tests. Where good faith really and truly exists, no degree of control can change that fact.*

CONCLUSION

The District Court erred in concluding that the trust grantors held or exercised any controls over the trust property other than those necessary to managing partners. The powers retained by the transferors, when considered in the light of all the circumstances, do not indicate any lack of true ownership in the transferees.

The verdict of the jury should be upheld and the decision of the District Court should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

Internal Revenue Code of 1939:**Sec. 167. INCOME FOR BENEFIT OF GRANTOR.**

(a) Where any part of the income of a trust—

(1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or

(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; or

(3) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in section 23(o), relating to the so-called “charitable contribution” deduction);

then such part of the income of the trust shall be included in computing the net income of the grantor.

Sec. 191. FAMILY PARTNERSHIPS.

In case of any partnership interest created by gift, the distributive share of the donee under the partnership agreement shall be includible in his gross income, except to the extent that such share is determined without allowance of reasonable compensation for services rendered to the partnership by the donor, and except to the extent that the portion of such share attributable to donated capital is proportionately greater than the

share of the donor attributable to the donor's capital. The distributive share of a partner in the earnings of the partnership shall not be diminished because of absence due to military service. For the purpose of this section, an interest purchased by one member of a family from another shall be considered to be created by gift from the seller, and the fair market value of the purchased interest shall be considered to be donated capital. The "family" of any individual shall include only his spouse, ancestors, and lineal descendants, and any trust for the primary benefit of such persons.

(As added by Section 340 of the Revenue Act of 1951.)

Internal Revenue Code of 1954:

Sec. 704. PARTNER'S DISTRIBUTIVE SHARE.

(e) FAMILY PARTNERSHIPS.

(1) **RECOGNITION OF INTEREST CREATED BY PURCHASE OR GIFT.** A person shall be recognized as a partner for purposes of this subtitle if he owns a capital interest in a partnership in which capital is a material income-producing factor, whether or not such interest was derived by purchase or gift from any other person.

(2) **DISTRIBUTIVE SHARE OF DONEE INCLUDIBLE IN GROSS INCOME.** In the case of any partnership interest created by gift, the distributive share of the donee under the partnership agreement shall be includible in his gross income, except to the extent that such share is determined without allowance of reasonable compensation for services rendered to the partnership by the donor, and except to the extent that the portion of such share attributable to donated capital is proportionately greater than the share of the donor attributable to the donor's capital. The distributive share of a partner in the earnings of the partnership shall not be diminished because of absence due to military service.

(3) PURCHASE OF INTEREST BY MEMBER OF FAMILY. For purposes of this section, an interest purchased by one member of a family from another shall be considered to be created by gift from the seller, and the fair market value of the purchased interest shall be considered to be donated capital. The "family" of any individual shall include only his spouse, ancestors, and lineal descendants, and any trusts for the primary benefit of such persons.

Committee Report:

HOUSE WAYS AND MEANS COMMITTEE REPORT. [Section 340, Revenue Act of 1951] is intended to harmonize the rules governing interests in the so-called family partnership with those generally applicable to other forms of property or business. Two principles governing attribution of income have long been accepted as basic: (1) income from property is attributable to the owner of the property; (2) income from personal services is attributable to the person rendering the services. There is no reason for applying different principles to partnership income. If an individual makes a bona fide gift of real estate, or of a share of corporate stock, the rent or dividend income is taxable to the donee. Your committee's amendment makes it clear that, however the owner of a partnership interest may have acquired such interest, the income is taxable to the owner, if he is the real owner. If the ownership is real, it does not matter what motivated the transfer to him or whether the business benefited from the entrance of the new partner.

Although there is no basis under existing statutes for any different treatment of partnership interests, some decisions in this field have ignored the principle that income from property is to be taxed to the owner of the property. Many court decisions since the decision of the Supreme Court in *Commissioner v. Culbertson* (337

U.S. 733 [49-1 USTC ¶ 9323]), have held invalid for tax purposes family partnerships which arose by virtue of a gift of a partnership interest from one member of a family to another, where the donee performed no vital services for the partnership. Some of these cases apparently proceed upon the theory that a partnership cannot be valid for tax purposes unless the intrafamily gift of capital is motivated by a desire to benefit the partnership business. Others seem to assume that a gift of a partnership interest is not complete because the donor contemplates the continued participation in the business of the donated capital. However, the frequency with which the Tax Court, since the *Culbertson* decision, has held invalid family partnerships based upon donations of capital, would seem to indicate that, although the opinions often refer to "intention," "business purpose," "reality," and "control," they have in practical effect reached results which suggest that an intrafamily gift of a partnership interest, where the donee performs no substantial services, will not usually be the basis of a valid partnership for tax purposes. We are informed that the settlement of many cases in the field is being held up by the reliance of the field offices of the Bureau of Internal Revenue upon some such theory. Whether or not the opinion of the Supreme Court in *Commissioner v. Tower* (327 U.S. 280 [46-1 USTC ¶ 9189]), and the opinion of the Supreme Court in *Commissioner v. Culbertson* (337 U.S. 733 [49-1 USTC ¶ 9323]), which attempted to explain the *Tower* decision, afford any justification for the confusion is not material—the confusion exists.

The amendment leaves the Commissioner and the courts free to inquire in any case whether the donee or purchaser actually owns the interest in the partnership which the transferor purports to have given or sold him. Cases will arise where the gift or sale is a mere

sham. Other cases will arise where the transferor retains so many of the incidents of ownership that he will continue to be recognized as a substantial owner of the interest which he purports to have given away, as was held by the Supreme Court in an analogous trust situation involved in the case of *Helvering v. Clifford* (309 U.S. 351 [40-1 USTC ¶ 9265]). The same standards apply in determining the bona fides of alleged family partnerships as in determining the bona fides of other transactions between family members. Transactions between persons in a close family group, whether or not involving partnership interests, afford much opportunity for deception and should be subject to close scrutiny. All the facts and circumstances at the time of the purported gift and during the periods preceding and following it may be taken into consideration in determining the bona fides or lack of bona fides of a purported gift or sale.

Not every restriction upon the complete and unfettered control by the donee of the property donated will be indicative of sham in the transaction. Contractual restrictions may be of the character incident to the normal relationships among partners. Substantial powers may be retained by the transferor as a managing partner or in any other fiduciary capacity which, when considered in the light of all the circumstances, will not indicate any lack of true ownership in the transferee. In weighing the effect of a retention of any power upon the bona fides of a purported gift or sale, a power exercisable for the benefit of others must be distinguished from a power vested in the transferor for his own benefit.

Since legislation is now necessary to make clear the fundamental principle that, where there is a real transfer of ownership, a gift of a family partnership interest is to be respected for tax purposes without regard to

the motives which actuated the transfer, it is considered appropriate at the same time to provide specific safeguards—whether or not such safeguards may be inherent in the general rule—against the use of the partnership device to accomplish the deflection of income from the real owner.

Therefore the bill provides that in the case of any partnership interest created by gift the allocation of income according to the terms of the partnership agreement shall be controlling for income tax purposes except when the shares are allocated without proper allowance of reasonable compensation for services rendered to the partnership by the donor, and except to the extent that the allocation to the donated capital is proportionately greater than that attributable to the donor's capital. In such cases a reasonable allowance will be made for the services rendered by the partners, and the balance of the income will be allocated according to the amount of capital which the several partners have invested. However, the distributive share of a partner in the earnings of the partnership will not be diminished because of absence due to military service.

When more than one member of a family is a member of a partnership all interests purchased by one member of the family from another will be treated as though the transfer were made by gift. For this purpose the family of an individual includes his spouse, ancestors, lineal descendants, and any trust for the primary benefit of such persons.

Section 340 applies to taxable years beginning after December 31, 1950. No inferences are to be drawn from its enactment with respect to taxable years beginning prior to January 1, 1951.

HOUSE WAYS AND MEANS COMMITTEE
REPORT ON REVENUE BILL OF 1951.

Nos. 17507-17509

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MAX KUNEY, JR., and CONSTANCE K. KUNEY,
His Wife; MAX J. KUNEY, SR.,
OLIVE R. KUNEY,

Appellants

v.

WILLIAM E. FRANK, District Director of
Internal Revenue,

Appellee

ON APPEALS FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF FOR THE APPELLEE

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INDEX

	Page
OPINIONS BELOW.....	1
JURISDICTION	2
QUESTION PRESENTED.....	3
STATEMENT	4
SUMMARY OF ARGUMENT.....	13
ARGUMENT:	
I Introduction	16
II Taxpayers' self-serving statements that they considered themselves as trustees are insufficient evidence of a bona fide gift of partnership interests under this record.....	19
III The purported gift made no change in the control or management of the partnership.....	23
IV Taxpayers retained complete unrestricted power to control the income being earned by and distributed to the trust.....	25
A. Power to change the method of allocating income between the grantors and the trusts..	26
B. Taxpayers could draw off income from the family partnership, siphoning the income into their own business interests.....	34
V Taxpayers' control over the assets essential to the partnership business was absolute.....	40
VI The purported transfer and the subsequent partnership and trust transactions were all made for tax avoidance purposes, thus confirming the fictitious nature of the transfer.....	42
VII In any case, the grantors retained so many of the incidents of ownership that they should continue to be recognized as substantial owners of the donated partnership interests.....	46

INDEX (Continued)

	Page
VIII The provisions of the trusts permit distribution of income to the grantors.....	50
CONCLUSION	53
APPENDIX A.....	54
APPENDIX B.....	67
APPENDIX C.....	98, 99

CITATIONS

CASES:

<i>Beebe v. Allison</i> , 112 Wash. 145, 192 Pac. 17.....	24
<i>Commissioner v. Culbertson</i> , 337 U.S. 733.....	18
<i>Commissioner v. Tower</i> , 327 U.S. 280.....	17
<i>Economos v. Commissioner</i> , 167 F. 2d 165.....	25
<i>Hash v. Commissioner</i> , 152 F. 2d 722.....	24
<i>Helvering v. Clifford</i> , 309 U.S. 331.....	25, 49
<i>Kohl v. Commissioner</i> , 170 F. 2d 531.....	25
<i>Kuney, Jr. v. Frank</i> (61-2 U.S.T.C., par. 9631) decided March 22, 1961.....	1
<i>Lusthaus v. Commissioner</i> , 327 U.S. 293.....	18
<i>Reddig v. Commissioner</i> , 30 T.C. 1382.....	42
<i>Schallerer v. Commissioner</i> , 203 F. 2d 100.....	17
<i>Sellers v. Commissioner</i> , 218 F. 2d 380.....	23
<i>Spiesman v. Commissioner</i> , 260 F. 2d 940.....	49
<i>Toor v. Westover</i> , 200 F. 2d 713.....	48

STATUTES:

Page

Internal Revenue Code of 1939:

Sec. 167 (26 U.S.C. 1952 ed., Sec. 167).....	54, 55
Sec. 191 (26 U.S.C. 1952 ed., Sec. 191).....	56
Sec. 3797 (26 U.S.C. 1952 ed., Sec. 3797).....	56

Internal Revenue Code of 1954:

Sec. 671 (26 U.S.C. 1958 ed., Sec. 671).....	48, 57
Sec. 677 (26 U.S.C. 1958 ed., Sec. 677).....	52, 57
Sec. 704 (26 U.S.C. 1958 ed., Sec. 704).....	48
2 Revised Code of Washington (1951), Sec. 25.04.270.....	24
Uniform Partnership Act (7 U.L.A., Sec. 27).....	24

MISCELLANEOUS:

H. Rep. No. 586, 82nd Cong., 1st Sess., p. 33 (1951-2 Cum. Bull. 357, 381).....	48
H. Rep. No. 1337, 83rd Cong., 2d Sess., pp. A 211, A 212 (3 U.S.C. Cong. & Adm. News (1954), 4017, 4352)	48
S. Rep. No. 627, 78th Cong., 1st Sess., p. 68 (1944 Cum. Bull. 973, 1023).....	52
Treasury Regulations on Income Tax (1954 Code), Sec. 1.704-1	42, 59
Treasury Regulations 118, Sec. 39.191-1.....	48, 66

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BRIEF FOR THE APPELLEE

OPINIONS BELOW

The instructions to the jury (R. 332-352) and its verdict (R. 77-78) are unofficially reported at 61-1 U.S.T.C., par. 9223. The District Court's oral opinion rendered in granting the Director's motion for judgment notwithstanding the verdict is unofficially reported at 61-2 U.S.T.C., par. 9631. (R. 353-357.) The District Court rendered a memorandum opinion in

denying the Director's motion for summary judgment which is not recorded. (R. 48-49.)

JURISDICTION

These appeals involve federal income taxes for the taxable years 1952, 1953, and 1954. (R. 50.) Taxpayers timely filed with the District Director federal income tax returns indicating income taxes due, which taxes were timely paid but, on or about November 20, 1957, the Commissioner of Internal Revenue mailed to taxpayer his statutory notices of deficiency ("90 Day Letter") determining deficiencies against the taxpayers for the years here involved. On or about February 5, 1958, the taxpayers paid or caused to be paid to the District Director the deficiencies so determined with interest thereon. (R. 51.) Timely claims for refund were filed by taxpayers and were rejected as follows (R. 52):

<u>Name</u>	<u>Date Claim Filed</u>	<u>Date Claim Disallowed</u>	<u>Taxable Year</u>	<u>Amount of Claim</u>
Olive R. Kuney	4/22/58	9/15/58	1952	\$14,289.47
Max J. Kuney, Sr.	4/12/58	9/15/58	1952	13,662.39
	4/10/58	9/15/58	1953	4,149.57
	4/12/58	9/15/58	1954	5,011.14
Max J. Kuney, Jr.	4/16/58	9/15/58	1952	35,076.95
Constance K. Kuney	4/16/58	9/15/58	1953	5,085.09
	4/16/58	9/15/58	1954	5,791.67
			Total	<u>83,066.28</u>

Within the time provided in Section 3772 of the Internal Revenue Code of 1939 and Section 6532 of the

Internal Revenue Code of 1954 and on February 4, 1960, the taxpayers brought actions in the District Court for recovery of the taxes paid. (R. 3-29, 53.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1340. After trial before court and jury a verdict was rendered in favor of the taxpayers on November 23, 1960. (R. 77-78.) On November 25, 1960, the Director, having moved for a directed verdict, filed a timely motion for judgment notwithstanding the verdict pursuant to Rule 50 of the Rules of Civil Procedure. (R. 78-85.) On March 22, 1961, the court rendered its decision in favor of the Director on his motion. (R. 353-356.) The judgment in favor of the Director was entered on April 25, 1961. (R. 86-87.) Within sixty days and on May 19, 1961, notices of appeal were filed. (R. 88-90.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Upon the record was the District Court correct in setting aside the verdict — that taxpayers in their trustee capacity were partners in the Kuney family partnership — as without support in the evidence and as positively negatived by the evidence and in directing judgment dismissing the complaints?

STATEMENT

These are suits for refund of income taxes for the calendar years 1952, 1953, and 1954. The Director's motion for summary judgment was denied (R. 48-49) and a pre-trial order was thereafter entered (R. 49-71). After trial to court and a jury the jury rendered a verdict in favor of taxpayers on the following question which was submitted to it (R. 77-78):

On a consideration of all facts and circumstances shown by the evidence and under the law given you by the Court, do you find the status of Kuney Sr. and Kuney Jr. in their trustee capacity (separate and apart from their personal capacity) as partners in the Kuney family partnership genuine, bona fide and valid for income tax purposes?

Thereafter the court granted the Director's timely motion for judgment notwithstanding the verdict (R. 353-356) and judgment was entered decreeing that taxpayers are not entitled to any recovery and dismissing their complaints with prejudice (R. 86-87).

The following facts are not in dispute:

The taxpayers, Olive R. Kuney and Max J. Kuney, Sr., are and at all times material hereto were residents of Seattle, Washington. Taxpayers Max J. Kuney, Jr., and Constance K. Kuney are husband and wife and at all times material hereto have resided in Spokane, Washington. (R. 50.)

Prior to January 1, 1952, taxpayers Max J. Kuney, Sr., and Max J. Kuney, Jr., were the sole partners in the firm of Max J. Kuney Company, engaged in the contracting business. (R. 146; Exs. 28, 34, Appendix B, *infra*.) The claims for refund raise the questions of who are the partners and who may be taxed for the income of the partnership Max J. Kuney Company for 1952, 1953, and 1954. (R. 53.) The income of the partnership for each of the calendar years involved, which was available for distribution among the partners for federal income tax purposes (prior to allowance of partners' salaries), was as follows (R. 54):

Class of Income	Calendar Year		
	1952	1953	1954
Ordinary income	\$419,346.59	\$85,796.42	\$ 55,571.02
Net long term capital gain	31,078.49	13,807.35	63,352.58
Total	\$450,425.08	\$99,603.77	\$118,923.60

The salaries paid by the partnership to the partners Max J. Kuney, Sr., and Max J. Kuney, Jr., for each of the years involved were as follows (R. 54):

Partner	1952	1953	1954
Max J. Kuney, Sr.	\$25,000	\$10,000	\$5,000
Max J. Kuney, Jr.	25,000	10,000	5,000

On or about February 11, 1952, Max J. Kuney, Sr., as grantor and Max J. Kuney, Jr., as trustee,

made and executed a trust agreement (R. 54) which states (R. 370):

* * * it is the intention of the Grantor to make a gift in trust for the benefit of his minor child, John Richardson Kuney, of a percentage of his interest in each of said partnership businesses;
* * * ¹

On or about the same date, Max J. Kuney, Jr., and Constance K. Kuney, as grantors,² and Max J. Kuney, Sr., as trustee, made and executed a trust agreement (R. 54) which states (R. 357):

* * * it is the intention of the Grantors to make a gift in trust for the benefit of their minor children and others of a percentage of their interest in each of said partnership businesses; * * *

In each of these trusts the grantor appointed himself successor trustee, retaining the further right to appoint additional trustees and a successor to himself as trustee. (R. 368, 380.)

The taxpayer-grantors each duly and timely filed federal and state gift tax returns indicating respective gifts of \$100,000 and paid the gift tax due thereon.

¹ The only partnership business substantially involved in this case is that of Max J. Kuney Company, which owned 50% interests in the Kuney Johnson Company, Teclar Aluminum Products and Agutter Electric Company. (Ex. 28, Appendix B, *infra*.)

² Constance K. Kuney was a party to the instrument as Max J. Kuney, Jr.'s. wife; accordingly, Max J. Kuney, Jr., will usually be referred to below as the grantor.

(R. 54-56.) Timely partnership returns were filed (R. 57) as were the taxpayers' personal (R. 51) and fiduciary (R. 57) returns. Income taxes paid as per the fiduciary returns and interest were, however, refunded to the trusts by the Commissioner of Internal Revenue. (R. 58.)

During each of the calendar years involved capital was a material income-producing factor in the partnership of Max J. Kuney Company. (R. 56.)

The primary beneficiaries of the trusts created by Kuney, Jr., were Caroline I. Kuney and Max J. Kuney, III, two and six years old, respectively, and the primary beneficiary of the trust created by Kuney, Sr., was John R. Kuney, seven years old at the time the trusts were created. (R. 100, 108, 265, 273.)

Under the terms of the respective trust instruments, the then trustees could accumulate all or any part of the trust income and could add it to the trust principal until the primary beneficiaries above reached the age of thirty years. (R. 362, 374.) The principal of each trust fund was not required to be paid out during the lives of the primary beneficiaries, but could be held by the trustee until the youngest issue of Caroline, Max and John, respectively, attains the age of twenty-one years, or would, if living, have attained the age of twenty-one years. (R. 360-361, 372-373.)

The trustees had absolute and sole discretion to distribute the principal when each primary beneficiary attained the age of twenty-one years and had sole and absolute discretion to use and apply all or such part of the trust income distributable to beneficiaries under the age of thirty years for or towards the maintenance, education, enjoyment, health and welfare of such persons and while such persons were under the age of twenty-one years, to so use and apply the income himself, or to pay the same, or any part thereof, to such person or to the parent or guardian of such person for the use and benefit of such person, without any responsibility for the application thereof by such guardian or parent. (R. 362, 373-374.) The grantor of each trust was at the time of the creation of the trust the parent of the respective primary beneficiaries. (R. 100, 265.) None of the primary beneficiaries had any control over the disposition of his interest in the trust property at his death; it would pass to his issue, if any survived or, if a beneficiary left no issue to the children of the trustee or their issue, in one case (R. 373), and to the "heirs at law of the last survivor" of grantors' children in the trust created by Kuney, Jr. (R. 361). The trustee of the trust created by Kuney, Jr., also had sole and uncontrolled discretion to pay to the mother, grandfather or grandmother of Kuney, Jr., or to any of them, at any time, such

portion or portions of the trust income as the trustee might deem necessary for the support, health, maintenance, welfare and enjoyment of such persons, due regard being given by the trustee to the other sources of income of such persons. It was also stated that the "Trustee's determination as to whether or not payments shall be made to the persons named in this section and the amount of such payments shall not be subject to judicial review." (R. 359-360.)

During the three years involved, distributions of trust income by the trustees to the respective grantors' children were made only in 1952 and were as follows (R. 56):

Distributee	Trust for Benefit of		
	Caroline I. Kuney	Max J. Kuney, III	John Richardson Kuney
Caroline I. Kuney	\$10,000		
Max J. Kuney, II		\$10,000	
John Richardson Kuney			\$18,788.72

Distributions from the trust created by Kuney, Jr., for his children were made by his father-trustee to his mother and grandparents as follows (R. 56):

Date	Distributee	Amount
1952	Lorraine B. Kuney	\$3,600
1952	C. H. and Mabel Bentley	4,800
1953	Lorraine B. Kuney	2,000
1953	C. H. and Mabel Bentley	4,800
1954	C. H. and Mabel Bentley	4,800

The following further facts appear from the record:

Immediately prior to the creation of the trusts, a partnership agreement existed between the taxpayers which contained the following provisions (R. 146):

The father shall continue as the nominal head of the firm with final decision on all matters pertaining to the firm, but it is contemplated that the father will gradually retire from active management with decreasing duties and responsibilities and that the son will take over increasing duties and responsibilities, but always with the father continuing in full authority with final decision on all matters pertaining to the firm.

When the trusts were set up appropriate entries were made in the partnership books to reduce the capital accounts of the grantors and establish capital accounts for the trusts (R. 122-123) but no change was made in the above partnership agreement (R. 162). On February 11, 1952, effective as of January 1, 1952, each grantor did execute an agreement with his trustee providing that the grantor's share of partnership "income shall be distributed annually between" the grantor and the trust "as provided by the rules of law then effective for family partnerships and in conformity with the provisions of said Trust." (Exs. 24, 25, Appendix B, *infra*; see R. 182-183.) Subsequently, on February 7, 1957, effective as of January 1, 1955,

a further agreement was made between the active partners, Kuney, Sr., and Kuney, Jr., that their respective salaries were to be paid so far as possible from partnership capital gains. (R. 181; Ex. G, Appendix B, *infra*.)

On February 11, 1952, the date of the creation of the two trusts, the understanding was that partnership profits were to be divided on the basis of total capital invested in the business by each partner. (R. 290.) The 1957 agreement referred to in the preceding paragraph made the same provision. (R. 181; Ex. G, Appendix B, *infra*.) An equal division of profits between father and son was the practice of the partnership previous to the creation of the trusts (R. 147-148); despite this, however, the father's and the son's capital accounts, both before and after the creation of the trusts, were not equal and the equal division of profits was "not in accordance with the capital invested at all" (R. 290; Ex. 28; Schedule B, following Br. 6A).

On June 1, 1953, the partnership operations were reorganized; only the fixed assets (land, buildings, machinery and equipment) were retained by the partnership. (Br. 10; R. 171.) That portion of the business formerly carried on by the partnership which consisted of constructing and conduct of actual opera-

tions was withdrawn from the partnership and thereafter carried on by the Max J. Kuney Company, Inc. (R. 124 - 126.) Kuney, Sr., testified that when the corporation was formed the trusts, as well as their grantors (Kuney, Sr., and Kuney, Jr.), were to receive an interest in the corporation (R. 165) through stock to be issued to the family partnership. However, in February, 1957, the corporate stock which had been issued to the family partnership, of which the trusts were nominally part owners, was recalled and cancelled as incorrectly issued and new certificates were instead issued to Kuney, Sr., and Kuney, Jr., individually. (R. 166-167, 168; Ex. R, Appendix B, *infra*.) No dividends were ever paid by the corporation to the partnership. (R. 221.) The effect of the formation of the partnership was to cause its total income to consist entirely of rental and interest payments made by the corporation to the partnership for the use of the partnership's fixed assets. (R. 173, 186-187.) As a matter of fact, the rental rates for the partnership assets used by the corporation during the years 1952, 1953, and 1954 were not actually determined until 1957. (R. 189, 190.)

Partnership assets were pledged as security on bank loans to the corporation even though the trusts owned no stock in the corporation. (R. 208, 295-296.)

The creation of the trusts, the formation of the partnership, the trust provisions pertaining to the distribution of trust income, the allocation of partnership income between the grantors and their trusts, the determination of the amounts of rent and interest to be paid by the corporation to the family partnership, and the gifts of additional partnership capital made to the children were all motivated by the purpose of reducing federal income taxes. (R. 106-110, 116, 143, 161, 241, 250, 251, 300; Exs. 24, 25, Appendix B, *infra*.)

SUMMARY OF ARGUMENT

The fact that the gifts of partnership interests in trust may have been effective under state law does not of itself suffice to make the donee-trusts the true owners of portions of the partnership for federal income tax purposes. It is the command of the taxpayer over the income which is the concern of the tax laws and single earnings cannot be divided into two units by the simple expedient of drawing up papers. The establishment of reciprocal trusts for interfamily gifts by grantors and trustees who are both closely related and the sole partners of the partnership concerned, requires the taxpayers to bear the heavy burden of proving they were *bona fide* partners in a separate and independent capacity as trustees. The record in this

case will not support a jury verdict for the taxpayers because there is no evidence that they no longer maintained dominion and control over the property and its income; indeed, the contrary is affirmatively established. Moreover, there is no evidence whatsoever in the record indicating that taxpayers acted as trustee-partners independently of their own interests, aside from the taxpayers' own self-serving testimony.

The purported gift made no change in the control or management of the partnership. Taxpayers remained the only active partners and they possessed and exercised complete unrestricted power to control the partnership assets and the income being earned by and distributed to the trust. Unquestionably, the creation of the trusts and the allocation of partnership profits were made to avoid federal income taxes. The record lacks evidence that the taxpayers as trustees acted solely in the interests of the trust beneficiaries.

In any case, taxpayers retained so many of the incidents of ownership in their own right that they remained the substantial owners of the income-producing property. To shift the incidence of income tax from the grantors, there must be a complete transfer of the substantial attributes of ownership,

dominion and control, as well as the forms of ownership.

Additionally, in light of the practical circumstances of the trust instruments, their reciprocal character and the close relationship of the parties, the provisions allowing the trustees to distribute the income to the grantors as the parents or guardians of the trust beneficiaries during their minority, should be examined carefully. Since the grantors will have the widest possible discretion in using the income for the benefit of their children and since such discretion is unencumbered by any fiduciary responsibility or supervision, these provisions throw grave doubt upon the genuineness of the trusts and also serve as an additional basis for treating the taxpayer-grantors as owners of the trusts within the meaning of Section 677 of the 1954 Code and Section 167 of the 1939 Code.

Upon the record, the District Court was amply warranted in setting aside the verdict as without support in the evidence and as positively negatived by the evidence and in directing judgment dismissing the complaint.

ARGUMENT

I

INTRODUCTION

As already stated, the question submitted to the jury in this case was (R. 77-78, 340):

On the consideration of all facts and circumstances shown by the evidence and under the law as given you by the Court, do you find the status of Kuney, Sr., and Kuney, Jr., in their trustee capacity, separate and apart from their personal capacity, as partners in the Kuney family partnership genuine, bona fide, and valid for income tax purposes?

The District Court's instructions on the law consisted of an explanation of how to determine whether or not taxpayers established by a preponderance of the evidence that they were entitled to the claimed refunds (R. 336-339) and a description of the substantive principles of law (R. 340-349) which closely followed the applicable Treasury Regulations (Appendix A, *infra*). The jury answered the above question "Yes". (R. 78.)

In response to the Director's motion to have the verdict set aside (R. 78-85), which question had been properly reserved under Rule 50(b) of the Federal Rules of Civil Procedure (R. 71-76, 77), the District Court set aside the jury verdict as not supported by substantial evidence and granted a judgment for the

Director notwithstanding the verdict. (R. 86-87, 355-356.) The District Judge explained "only generally" (R. 354) that, while there was some evidence not inherently incredible which might support a fact finding favorable to taxpayers on one or more of the factors referred to, the vital element of retention and exercise of control is "positively negated by the evidence" (R. 355) and "the Court has the clear and firm conviction that the evidence as a whole is not sufficient to sustain plaintiffs' affirmative burden of proof on that basic issue" (R. 356).

The fact that a gift was made in trust and effective under state law does not of itself suffice to make the donee the true owner of the donated capital for federal income tax purposes. *Schallerer v. Commissioner*, 203 F. 2d 100 (C.A. 7th). It is the command of the taxpayer over the income which is the concern of the tax laws and single earnings cannot be divided into two tax units by the simple expedient of drawing up papers. *Commissioner v. Tower*, 327 U.S. 280, 291. While the decisive question of whether or not a bona fide partnership was intended is factual the Supreme Court has made it clear that, where the services contributed by the donee partner are not "vital" and "he has not participated in 'management and control of the business' or contributed 'original capital'," the taxpayer has a "heavy burden" to prove the above ulti-

mate fact. *Commissioner v. Culbertson*, 337 U.S. 733, 744. In *Culbertson*, the Court went on to analyze its decisions in *Tower* and *Lusthaus v. Commissioner*, 327 U.S. 293, stating that (pp. 745-746) :

In each case the husband continued to manage and control the business as before, and income from the property given to the wife and invested by her in the partnership continued to be used in the business or expended for family purposes. * * * This, we thought, provided ample grounds for the finding that no true partnership was intended; that the husband was still the true owner of the income.

Thus, where as in the instant case, taxpayers retained and exercised control over both the property purportedly transferred and the income earned therefrom, a jury cannot, as a matter of law, find that a bona fide partnership was intended. The District Director submits that taxpayers' self-serving assertions of good faith and the fact that the trust beneficiaries' share of retained earnings has grown are not enough to support such a verdict. There must be some concrete evidence that the donee-trustee acted independently of the taxpayers or that the taxpayers no longer maintained dominion and control over the property and its income. The family relationship facilitates too easily the shifting of tax incidence by mere surface changes of ownership.

II

TAXPAYERS' SELF-SERVING STATEMENTS THAT
THEY CONSIDERED THEMSELVES AS TRUSTEES
ARE INSUFFICIENT EVIDENCE OF A BONA FIDE
GIFT OF PARTNERSHIP INTERESTS UNDER THIS
RECORD

Taxpayers' argument on appeal seems based on the proposition that the grantors, as independent trustees, were acting in the best interests of the trust beneficiaries and, as such, were partners in the partnership and had the same management powers in the partnership as trustee-partners as they had as partners in their own interests. (Br. 17, 18, 20, 21.) It is submitted that there is no evidence whatsoever in the record indicating that taxpayers acted as trustee-partners independently of their own interests aside from taxpayers' own self-serving testimony. Indeed, the record affirmatively establishes that taxpayer-grantors retained in their own right and exercised control over the property purportedly donated to their children.

Taxpayers contend that the evidence shows the grantors, as trustee-partners, exercised their independence in at least one important matter. (Br. 20.) The only evidence in the record to which taxpayers could possibly have reference is the following testimony of Max J. Kuney, Jr. (R. 277-278):

Q. Has there been substantial disagreement between your father and yourself relative to important business matters?

A. Occasionally.

Q. Could you give us an example?

A. Well, the most recent and perhaps the most important was in 1958 when he desired to establish a separate contracting branch in Seattle to do highway work after the dissolution of the other Seattle businesses, and at first I agreed with that idea because we planned it to be completely separate and autonomous, to have its own shop and own equipment, and he took in two outside partners outside our business, outside our family, and formed the company. But then he decided he wanted to run it with equipment from Spokane, that is, family partnership equipment and use it for piecemeal periods and return it, and we would not have maintenance facilities here for it. So I did not approve, and there was quite a considerable argument, believe me, but the ultimate result was that that company was dissolved, the other investors received their money back, and we did not go into the business here.

Nothing in this testimony indicates that Kuney, Jr., exercised his judgment and partnership control as an independent trustee with the best interests of the trust beneficiaries in mind. At best, it indicates that, by 1958, Kuney, Jr., exercised his business judgment independent of that of his father when it came to his making a personal investment in a new business.

Taxpayers contend that the testimony of the wit-

nesses, Henry and Coon, established that “all creditors were made aware of the existence of the trusts as partners in the Kuney family partnership.” (Br. 13.) However, Mr. Henry and Mr. Coon testified only for the surety company and the bank, respectively, both of which did business with the Max J. Kuney Company (R. 198-201; 204-207), and the Kuney Company financial statements indicate that the partnership had substantial liabilities in addition to contract bonds and bank loans. (Exs. 30, 31, 32, Appendix B, *infra*.) Each of these statements omitted any reference at all to the trusts when describing the various partners. (Exs. 30, 31, 32, R, Appendix B, *infra*.)

Furthermore, Mr. Henry testified that he knew a Mr. Claggett was a special partner and that he was not surprised that the Dun & Bradstreet report of 1953 listed Claggett as a partner and made no mention of the trusts. (R. 202-203.) Mr. Coon stated Mr. Claggett was not a partner in the family partnership but “in the profits.” (R. 212-213.) The financial statement of December 31, 1952, did not list Mr. Claggett at all as affiliated with the company enterprises. (Ex. 30, Appendix B, *infra*.) After the formation of the corporation Kuney, Sr., and Kuney, Jr., and allegedly the trusts, were the sole owners of the Max J. Kuney Company partnership, the partnership instantly in-

volved. (Ex. A, Appendix B, *infra*.) The Dun & Bradstreet report of 1953 did not list Mr. Claggett as a partner in the Max J. Kuney Company; it described him as a "partner" in the Heavy Construction Division of the corporation. (Ex. 31, Appendix B, *infra*.) The certificates of true name or firm name filed for Max J. Kuney Company in 1945 and 1953, respectively, stated that Kuney, Sr., and Kuney, Jr., were the only persons conducting business under the name of Max J. Kuney Company. (Exs. 34, 35, Appendix B, *infra*.)

The testimony of Mr. Henry and Mr. Coon indicated only that they knew of the existence of the trusts. (R. 202, 203, 205, 206, 208.) Since no partnership agreement was ever executed naming the trustees as partners, no financial statements ever stated that any partner was a trustee, and since the certificates of true name, which must be filed by partnerships doing business in Spokane County, stated that Max J. Kuney and Max J. Kuney, Jr., were the only persons conducting or having an interest in the Max J. Kuney Company (Exs. 34, 35, Appendix B, *infra*), it is highly doubtful that the firm's past, present or potential creditors knew that Kuney, Sr., and Kuney, Jr., considered themselves as partner-trustees, bound to act in the interests of their children.

The record is plainly void of any testimony by disinterested witnesses (see *Sellers v. Commissioner*, 218 F. 2d 380 (C.A.9th)) or any objective evidence that the taxpayers made or even had power to make partnership decisions as independent trustees. Both taxpayers stated that they each represented two partnership interests, that of their respective trust and that of their own personal estate, and they asserted that they kept these interests separate and independent. The record in its entirety indicates the contrary; this was but a paper arrangement, the real control remained with the taxpayers, unrestricted by any fiduciary obligations. When the evidence, or lack of evidence, as to the independence of the trustees is viewed together with the circumstances and the various controls over the property retained and to some extent exercised, it is clear that the purported intrafamily gifts were intended to have only tax consequences.

III

THE PURPORTED GIFT MADE NO CHANGE IN THE CONTROL OR MANAGEMENT OF THE PART- NERSHIP

Before each taxpayer transferred a portion of his interest in the partnership to the other taxpayer for the benefit of each one's family, taxpayers had a partnership agreement between them which designated the

father as nominal head of the firm with full authority to make final decisions on all matters pertaining to the firm. (R. 146.) Taxpayers never even went through the formality of drawing up a new partnership agreement when, as they claim and the Director denies, two new persons (Kuney, Sr., and Kuney, Jr., as trustees) became active partners in the firm. They merely made entries in the partnership books to change the capital accounts and agreements were executed by each grantor and his respective trustee requiring that partnership income be allocated between the grantor and the trust according to the federal tax law. (R. 122, 160-161; Exs. 24, 25, Appendix B, *infra*.) Clearly, if an independent person or entity were to become a trustee for either of the trusts, he would not become a partner in the family partnership, but would merely own an interest in the partnership. 2 Revised Code of Washington (1951), Section 25.04.270; *Beebe v. Allison*, 112 Wash. 145, 192 Pac. 17; Uniform Partnership Act (7 U.L.A., Section 27). Mere book entries are insufficient to change either the partners of the firm or the donor partner's tax obligations. *Hash v. Commissioner*, 152 F. 2d 722, 724 (C.A. 4th). Taxpayers have made neither a formal nor a substantive transfer of control and management to themselves as independent trustees, but have merely

reallocated partnership income for federal income tax purposes.

Taxpayers Kuney, Sr., and Kuney, Jr., were the only active partners in the family partnership both before and after the creation of the trusts. Father and son were grantors, trustees and partners in a business owned by themselves and their family. However effective the transfer of taxpayers' interest in the partnership may be under state law, a transfer "which makes no real change in the economic situation of the group or in the control or management of the business" should not be allowed to reduce the federal income tax obligations of the donor. *Kohl v. Commissioner*, 170 F. 2d 531, 535 (C.A. 8th); *Economos v. Commissioner*, 167 F. 2d 165, 167 (C.A. 4th). Since the income remains in the family and since the taxpayers have retained control over the property, they have substantially complete assurance that the trust will not effect any real change in their economic position. *Helvering v. Clifford*, 309 U.S. 331, 335-336.

IV

TAXPAYERS RETAINED COMPLETE UNRESTRICTED POWER TO CONTROL THE INCOME BEING EARNED BY AND DISTRIBUTED TO THE TRUST

The taxpayers retained complete unrestricted power to control the income being earned by and dis-

father as nominal head of the firm with full authority to make final decisions on all matters pertaining to the firm. (R. 146.) Taxpayers never even went through the formality of drawing up a new partnership agreement when, as they claim and the Director denies, two new persons (Kuney, Sr., and Kuney, Jr., as trustees) became active partners in the firm. They merely made entries in the partnership books to change the capital accounts and agreements were executed by each grantor and his respective trustee requiring that partnership income be allocated between the grantor and the trust according to the federal tax law. (R. 122, 160-161; Exs. 24, 25, Appendix B, *infra*.) Clearly, if an independent person or entity were to become a trustee for either of the trusts, he would not become a partner in the family partnership, but would merely own an interest in the partnership. 2 Revised Code of Washington (1951), Section 25.04.270; *Beebe v. Allison*, 112 Wash. 145, 192 Pac. 17; Uniform Partnership Act (7 U.L.A., Section 27). Mere book entries are insufficient to change either the partners of the firm or the donor partner's tax obligations. *Hash v. Commissioner*, 152 F. 2d 722, 724 (C.A. 4th). Taxpayers have made neither a formal nor a substantive transfer of control and management to themselves as independent trustees, but have merely

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The taxpayers retained complete unrestricted power to control the income being earned by and dis-

tributed to the trust. This power to control the trusts' share of partnership income was not only latent but was actually exercised by the taxpayers, as was brought out by the uncontradicted testimony of taxpayers' witness, Harold V. Bowen, their own certified public accountant. (R. 247, 261.) Such control was manifested in the power to change the method of allocating income between the grantors and the trusts; the power to make mere bookkeeping entries in the partnership's books changing the nature of the trusts' investments in the partnership business; and the power to siphon off or increase the family partnership income by their relations with and the creation and operation of the taxpayers' other business enterprises, such as their corporation.

A. Power to change the method of allocating income between the grantors and the trusts

Taxpayers could and did control the trust income by changing the method of allocating the partnership income between the taxpayer-grantors and the trusts. They were not held to a specific method of allocation because their executed agreements stated only that partnership income shall be allocated between the grantors and their respective trusts according to the federal tax law. (Exs. 24, 25, Appendix B, *infra*.)

Apparently, the taxpayers' original intention was

to allocate income between the grantors and their trusts according to the ratio between the interest in the partnership owned by each trust and the interest each grantor retained. (R. 230, 231; Ex. 28, Appendix B, *infra*.) According to the figures furnished by the taxpayers to the Washington State Tax Commission, in connection with the state gift tax, the Kuney, Sr., trust would receive 16.45% of Kuney, Sr.'s. income or 9.038% of total income (income was to consist of profits minus salaries paid to taxpayers as managing partners) and the Kuney, Jr., trust was to receive 20.05% of his share or 9.038% of total income. (Ex. 28, Appendix B, *infra*.) Even assuming the partnership profits were to be divided 50-50 (cf. R. 146, 147-148; 181; 290) between Kuney, Sr., and Kuney, Jr., before the allocation of income between grantors and their trusts, the trusts should have received 8.225% and 10.025%, respectively. (Ex. 28, Appendix B, *infra*.) The actual ratio of partnership capital possessed by the respective grantors and their trusts, according to figures stated by taxpayers themselves (contained in Schedule A forming part of the appendix to taxpayers' brief, following Br. 6a), was made to fluctuate as appears from the following table:

	Sr. Trust	Jr. Trust
1952	8.335%	10.230%
1953	22.74%	22.18%
1954	23.90%	22.62%
1955	28.88%	26.90%
1956	33.06%	31.10%
1957	23.82%	22.92%
1958	29.04%	28.48%

On cross-examination, Mr. Bowen testified (R. 236-237) :

Q. And in the original 1955 return, he got 41.6 per cent of the income and his trust for John R. was 8.84 per cent?

A. Yes.

* * * *

Q. Now in the Bible,³ Senior goes down to 16.99?

A. Yes.

Q. And the son's John R.'s, goes up from 8.84 up to 33?

A. Yes.

Q. 33.66?

³ The "Bible" is a series of journal vouchers written by Kuney, Sr., and referred to as such in the course of the trial. (R. 180-181; Ex. G.) Journal vouchers 4 (Ex. G, Appendix B, *infra*), demonstrates what little substantive effect taxpayers gave to the formalities they underwent. The journal entry states that profits were to be divided on the basis of total capital investment but then the entry directly underneath that statement divides profits on the basis of investment in fixed assets. (R. 256-257.)

A. Yes.

Q. In the beginning Senior had almost five times as much income as John R.?

A. That is right.

Q. But the time we come to what the Bible says, we got about twice as much for John R. as we have the father?

A. Yes.

The testimony then goes on to show that by the amended returns the amounts to Kuney, Sr., and the trust for his child were yet another percentage. This additional change was explained as resulting from a discovery of some property in California worth \$305,000, which value had not been used in dividing up the income—although there is no question but that the investment in the business was the same regardless of where the funds were invested. (But see R. 239.) Mr. Kuney, Sr., in response to this same line of questions stated (R. 196-197):

Q. Could you explain for us, Mr. Kuney, why for the Bible in 1955 that your interest in the income was 16.99, John R.'s income was 33.66, and that for the amended return which you filed 4/14/58, your share of income was 28 per cent and John R.'s was 22.4? How do you explain that, Mr. Kuney, if your distribution was always in accordance with capital interest which you could not control?

A. I believe I can explain that quite easily.

Q. Please do, sir.

A. You state that in one original return it was one way and on an amended return it was another way, did you not?

Q. This is the Bible?

A. What?

Q. This is the Bible — subsequent to the Bible you prepared an amended return—so I might state this, this is in 1957—this is in 1957 while we are still trying to figure out what happened back in 1955 and in 1957 concerning 1955 in your Bible you say 17 per cent, in your amended return you say 28 per cent. In one your son has more and in the other your son has less?

A. Yes.

Q. Its determination is all in accordance with capital interest which you do not recall?

A. Do you want an explanation?

Q. Yes, we want you to explain.

Q. First it is an amended return. Bear that in mind. That means there is a change of figures by necessity. That is enough explanation.

Q. (By Mr. Biggins): That is the only one you care to give?

A. That is sufficient.

While the original intention was to allocate in-

come on the basis of the ratio of capital investments in the partnership (R. 230-231), after about two years the method of allocating income between the grantors and their trusts was changed to a method based upon the ratio of investments in fixed assets held by the partnership and a separate account was established for investments in the firm by the various parties which exceeded their respective investments in fixed assets (R. 245, 246). These separate accounts were established by the directive of Kuney, Sr., and were designated capital surplus accounts. (R. 246-247.) Taxpayers had complete power over the allocation of partnership income between the trusts and themselves because they could simply change the balances in investment in the fixed asset accounts and the capital surplus accounts by mere book entries. Mr. Bowen testified (R. 247):

Q. All right. But capital surplus accounts were established in this partnership by the directive of MJK, weren't they?

A. Yes.

Q. And that was this personal account — this personal surplus account you were talking about on the blackboard of \$740,000?

A. Yes.

Q. Which was under their control, we have established that?

A. Yes.

Q. And under their control, they could determine the amount of income distributed to them, we established that?

A. Yes.

Q. Now, it is equally true, unless you want to go all the way through this, Mr. Bowen, it is equally true that sometimes in some of these years they computed the interest on this (indicating)—

The Court: On what?

Q. (Continuing): — total investment, and in other years they computed it on breakdown, including your so-called fixed assets? They went back and forth, that is true, isn't it? Must I go through these, or don't you know?

A. Generally speaking, I think that is correct.

The witness further testified that the taxpayers directed the earnings one way at one time and one way at another (R. 261), although he seemed to feel the treatment became consistent in 1957, effective as of 1955 when the taxpayers decided that rental income should be paid to the partnership from the corporation on the basis of investment in fixed assets only (R. 260). Clearly, however, during the tax years 1952, 1953 and 1954, the method was subject to change, indeed it was changed by the taxpayers. (R. 261.)

The record is also clear that the grantors of the trust could control the trust income by withdrawing amounts from the trust capital and carrying the amounts as partnership loans payable on which interest would be paid. In other words, by simply changing an account from capital to loan the shares of the profits could be controlled. That there was power to make such changes cannot be doubted since they were actually made in the year 1952, the first year of operation. (R. 136-137.)

Furthermore, the income to be paid as salaries was controlled by the grantors and they in fact provided that their salaries were to be paid out of capital gains to the extent thereof. (R. 181, 248-249.) Certainly payment by way of capital gains rather than by way of ordinary income is a substantial benefit to the person entitled to control such a determination in his own favor and is a control over income not generally enjoyed by one partner as opposed to the other partners in a *bona fide* business partnership. Taxpayers plainly were attempting to impose upon the trusts the obligation to take a larger part of the partnership income as ordinary income and were attempting to attribute to themselves — to the prejudice of the trusts — the advantage of a disproportionate part of the capital gains earned by the partnership.

In any event, such an agreement should not be effective for tax purposes. Allocating capital gains to the partner's salaries has no apparent business purpose and will not affect the dollar amount of any partner's share of the total partnership income or loss so that its only purpose must have been to reduce the taxpayer's individual income taxes. Section 704(b)(2) of the Internal Revenue Code of 1954 and the Regulations (Section 1.704-1(b)(2)) very clearly prevent such manipulation of tax consequences by the use of a partnership agreement. (Appendix A, *infra*.)

B. Taxpayers could draw off income from the family partnership, siphoning the income into their own business interests

In addition to their control over the allocation of profits between the parties, taxpayers had complete control over the amount of income which could become available to the family partnership. On June 1, 1953, they removed the contracting business from the partnership, leaving only the equipment and other fixed assets. (R. 126-127.) Originally the trusts were to have an interest in the contracting business (R. 165; Ex. Q, Appendix B, *infra*) and in fact the stock was issued to the partnership (R. 167, 171; Ex. Q, Appendix B, *infra*) (meeting of February 7, 1957)). However, subsequently, in February, 1957, the stock issued

to the partnership in exchange for the contracting business was recalled and cancelled as "incorrectly issued" and instead stock was issued to the taxpayers only, Kuney, Sr., and Kuney, Jr. (R. 166, 167-168.) This action was given retroactive effect. (R. 173, 186-187; Ex. A, Br. 10.)

Max Kuney, Sr., conceded, on cross-examination, that he had been mistaken in answering on deposition that "The trusts have never had any interest in the profits and losses of the corporation." (R. 169, 170-171.) He then testified (R. 171-172):

Q. But this much we are very clear on, I believe, then, at this time, Mr. Kuney, that in the beginning the children, Jeff, Caroline, and John did have an interest in the corporation?

A. Yes.

* * * *

Q. (By Mr. Biggins): They were later deprived of that interest, weren't they?

A. The investment was placed elsewhere, and they were deprived of their interest in the corporate stock, and their money was invested elsewhere.

Q. They were deprived of their interest in the corporation, weren't they?

The Court: Please answer directly to the question.

A. Yes.

Q. (By Mr. Biggins): And all they had left was the interest in the fixed assets which were leased to the corporation, leased or rented, that is all?

A. That is what they had.

Q. And you have never in your long business life ever treated a business partner that way now, have you?

A. (No response.)

Taxpayers in their brief (p. 10), contend that this action was taken in the best interests of the trust beneficiaries. Clearly the record fails to so indicate. (R. 186-187.) Kuney, Sr., testified (R. 138):

Q. Did the formation of the corporation in any way reduce the share of profit earned by the trust?

A. Well, as it turned out, as a matter of fact, it happened to be beneficial to them, but we didn't exactly foresee it. It happens that the corporation had a bad year in 1959, but that certainly wasn't anticipated.⁴

In any event, it is clear evidence of a retention and

⁴ The year the assets to the corporation were retained by the partnership the trusts' earnings were much greater than they were in the following four tax years. Thus, for the taxable years 1952, 1953 and 1954, income earned by both trusts was, according to the taxpayers' brief (Schedule A following Br. 6A), \$74,897.51, \$14,778.43, and \$48,721.13.

exercise of control over income by taxpayers. After taxpayers knew the exact amounts of income earned by the contracting business they were able and did determine retroactively whether or not the trusts would share in that income as stockholders or as mere lessors of equipment and other assets.

As of the date the corporation was organized, the total income earned by the family partnership was derived from its dealings with taxpayers' corporation. The partnership received rental payments, or interest payments in lieu of rent, at the discretion and within the control of the taxpayers. The first rental agreement (May 14, 1953) provided that rental rates shall be as "agreed upon between the parties." (Ex. 33, Appendix B, *infra*.) This agreement was signed only by Kuney, Sr., both as partner of the family partnership, and as president of the corporation. (Ex. 33, Appendix B, *infra*.) Then on March 20, 1956, Max J. Kuney announced at the corporation's meeting of shareholders, directors and officers that rentals should consist of interest on investment, allowed or allowable depreciation, plus 30%, and that any controversies over the rentals would be settled by the federal income tax laws and the opinions of the revenue agents. (R. 326-327; Ex. Q, Appendix B, *infra*.) On May 1, 1956, at a stockholder meeting presided over by Kuney, Sr.

(there was no indication as to who else was present), the minutes stated that "it was agreed that establishment of the exact rates and procedures would be postponed pending receipt of the examining revenue agent's report." (Ex. Q, Appendix B, *infra.*) The minutes of the special meeting of February 7, 1957, stated that, since the revenue agent had taken the position that the fixed assets held and rented by the partnership had in substance been transferred to the corporation, the rental charges on fixed assets for the "years 1955 and 1956 should best be held in abeyance until the treasury's position on this question was better known." (Ex. Q, Appendix B, *infra.*) It was then provided that rentals would subsequently be charged retroactively and the "corporation shall pay interest on the partner's investment in fixed assets [during the years in question] at the interest rate corporation paid the banks for borrowed money during those years." (R. 244; Ex. Q, Appendix B, *infra.*) Mr. Bowen testified that the methods for charging rent changed between 1955 and 1956 even though the management directive stated that rentals for *both* 1955 and 1956 should be based upon interest rates. (R. 245.) He also testified that the method of determining rental income was "finalized" in 1957 (R. 260), but that in 1959 no rent was charged at all (R. 246). If this really had been a *bona fide* partnership situation, the amounts

of rental income and expense would have depended upon negotiation between the two entities, with all interests represented and protected, and would not have been wholly dependent upon the revenue agent's opinion as to the reasonableness of the business expense deduction claimed by taxpayers' corporation.

This evidence emphatically establishes three points: (1) Decisions often were made by taxpayer Kuney, Sr., in his personal capacity and sole discretion, as corporation president without any negotiation with the partnership; (2) decisions as to allocation of income between the parties (in the above instances between the corporation and the partnership) were dependent solely upon federal tax consequences with no apparent attention to the fairness of the rates, the going market rates, or the interests of the trust beneficiaries; and (3) taxpayers had complete control over the amount of income the partnership could receive from the contracting business.

In summary, it can be stated without equivocation that the taxpayer-grantors did retain and did exercise control, both direct and indirect, over income distribution.

TAXPAYERS' CONTROL OVER THE ASSETS ESSENTIAL TO THE PARTNERSHIP BUSINESS WAS ABSOLUTE

Taxpayers' control over the assets essential to the partnership business was absolute. They were bought and sold constantly by the grantors. (R. 173.) They earned income for the partnership only as they were rented to the taxpayers' corporation.⁵ Partnership assets were even pledged as security on loans to the corporation in which the trusts had no interest whatever. Mr. Coon, taxpayers' banker, testified (R. 208):

Q. So I may be clear on that, you have made periodic credit investigations of this company?

A. I should say so.

Q. And you do loan money to them?

A. That is true.

Q. And you accordingly know that the partnership has pledged and/or made available to the corporation its fixed assets?

A. That is right.

Mr. Max Kuney, Jr., testified (R. 295-296):

⁵ Most of the partnership equipment being used by the corporation was rent free under the rental agreement since it had no book value and allegedly the maintenance costs were high. (R. 325-326.)

Q. And I asked him [Mr. Coon] if it is true that the corporation ever pledged some of this property for the money that the corporation wanted to borrow at the bank? Do you remember a question such as that?

A. Yes.

Q. And his answer was yes?

A. That is right.

Q. And that is true, isn't it?

A. That is true.

Q. And who does that property belong to?

A. It belongs to the various partners.

Q. But who is borrowing the money, the corporation?

A. The corporation is signing the notes on the money.

Q. And at that time did the children have any interest at all in the corporation?

A. No, sir.

THE PURPORTED TRANSFER AND THE SUBSEQUENT
PARTNERSHIP AND TRUST TRANSACTIONS
WERE ALL MADE FOR TAX AVOIDANCE PUR-
POSES, THUS CONFIRMING THE FICTITIOUS
NATURE OF THE TRANSFER

The motives for the gift of a partnership interest between members of a family are not material where the reality of the transfer or interest is otherwise satisfactorily established. However, the presence or absence of a tax-avoidance motive is one of the more important factors to be considered in determining the reality of a transfer by gift of the ownership of a capital interest in a partnership. Treasury Regulations on Income Tax (1954 Code), Section 1.704-1-(e)(2)(i) and (x), Appendix A, *infra*. The Tax Court has stated in *Reddig v. Commissioner*, 30 T.C. 1382, 1395:

The motive to save taxes, of course, is not incompatible with the intention to create a bona fide partnership but where it appears, as here, that the parties merely executed instruments of trust and partnership which contain the language of formal requirements of a new partnership but also language retaining control in donors and then proceeded, in effect, to ignore any new relationship, then we cannot escape the implication that the new arrangement was a sham, and the ownership of the donees was not the real ownership demanded by the statute.

Taxpayers at bar never even executed a partnership agreement making the trustees partners and the record is replete with evidence that the transfer (R. 106-110, 143, 241), the trust provisions (R. 116), the provisions governing division of profits between grantor and trustee (R. 157, 160, 161; Exs. 24, 25, Appendix B, *infra*), the determination of rental rates payable by the corporation to the partnership (R. 316-320), the trust distributions to beneficiaries (R. 194-195), and the additional gifts to the taxpayer's children (R. 250, 251, 299, 300, 306), all were made to avoid federal taxes. The taxpayers transferred their interests in the partnership to themselves, as trustees, retaining all their power and control over the partnership; they were able to retain the trust investments and income in the partnership and they could, and did, control the partnership assets and both the total amount of income the partnership could earn from its dealings with the corporation and the portions of partnership income distributable to the trust. Clearly, the only substantial effect of the purported transfer was to shift income from the taxpayers (Kuney, Sr., was in the 90% tax bracket (R. 143)) to their children without making any real change in the economic situation of the group or in the control or management of the business. The fact that the trusts' earnings increased and that their retention in the business in-

creased the trusts' capital interests in the partnership only buttresses the District Court's findings. The taxpayers retained and exercised such control over the business, its income and its assets that a jury could not reasonably find that the transfer was *bona fide* and effective for tax purposes. The increased taxable earnings of the trusts were the purpose of the tax avoidance scheme. The more tax paid by the trusts the less the tax of the entire family group became.

The taxpayers had such control over the allocation of income between themselves and their children that it could be exercised retroactively, after the total amount of the family income from all sources was known. The fact that trust income was retained as additional investment in the business rather than distributed to the trust or its beneficiaries is additional evidence of the lack of reality and *bona fides* of the purported gift; indeed, it allowed the taxpayers to control and change the profit-sharing ratios. When the donors do not make the trustees partners but only owners of interest in the partnership, when the trustees have never taken any action which appears to have been taken solely in the interests of the trust beneficiaries, and when the donors have, in their own right, retained and exercised the control they have in the instant case, selfserving assertions that taxpayers

considered themselves trustees are insufficient evidence for a jury to find *bona fide* gifts of full and complete ownership of the partnership interests.

Taxpayers claim a *bona fide* partnership was formed with themselves as trustees serving as separate independent partners acting solely in the interest of the trust beneficiaries. The Director submits that the record is void of any evidence indicating this and, on the contrary, the taxpayers retained and exercised such complete and absolute control over the transferred property and the income earned from the property as to clearly characterize the purported gift as a mere paper transaction — a sham for tax purposes. Max Kuney, Jr., testified, on direct examination (R. 272):

Q. It [creation of the trust] simply changed the persons who owned an interest in it?

A. It changed the ownership of interest. It didn't change the management at that time, and I certainly am unaware today if there is any requirement for a business purpose under this law.

Clearly, there was no change in management and control of the property transferred, the interest in the partnership. All that occurred was a transfer of rights to income, hedged about by restrictions and determined after earned; and, a transfer of corpus, which the taxpayers, as trustees, need not distribute until the youngest child of each respective donee-beneficiary

attained the age of twenty-one years, or would have attained such age if living. (R. 360-361, 372-373.)
As Max Kuney, Sr., aptly put it (R. 128):

Q. Why do you call yourselves operating partners?

A. We are adults as distinguished from the children and the trustees who do nothing.

VII

IN ANY CASE, THE GRANTORS RETAINED SO MANY OF THE INCIDENTS OF OWNERSHIP THAT THEY SHOULD CONTINUE TO BE RECOGNIZED AS SUBSTANTIAL OWNERS OF THE DONATED PARTNERSHIP INTERESTS

Taxpayers maintain, in effect, that where there is a valid assignment of income-producing property, effective as between the parties under local law, the only question that remains for a determination of the tax consequences is whether or not the donors intended in good faith to divest themselves of substantial ownership. Their brief seems to rest on the proposition that (p. 21):

The most that can be made out of controls retained by grantors of trusts in family partnership cases is that they are tests of good faith, but only tests. Where good faith really and truly exists, no degree of control can change that fact.

But this statement is incorrect. Notwithstanding good

faith, to shift the incidence of income tax from the grantors, there also must be a complete transfer divesting them of the substantial attributes of ownership, dominion and control, as well as the technical forms of ownership.

The Supreme Court in the *Culbertson* case *supra*, p. 748, remanded a family partnership case to the Tax Court for a finding as to which of the sons "was there a bona fide intent that they be partners in the conduct of the cattle business, either because of services to be performed during those years, or because of contributions of capital of which they were the true owners, as we have defined that term in the *Clifford*, *Horst*, and *Tower* cases." (P. 748.) The Court made it clear that a donee of property could invest the property in a family partnership and become a true partner. However, the Court stated (p. 739) that it would violate the first principle of income taxation to tax persons who contribute nothing during the tax period. (P. 739.) It is clear, the District Director submits, that neither the Supreme Court nor this Court would tax a trust which was not the real or substantial owner of the income-producing property, notwithstanding the good faith intent of the trust grantor. The Supreme Court said that the donee partners must have participated (in the sense of contributing labor, skill

or capital — no matter what the source) in the business during the tax year and stated (p. 740):

The vagaries of human experience preclude reliance upon even good faith intent as to future conduct as a basis for the present taxation of income.

Also, this Court in *Toor v. Westover*, 200 F. 2d 713, 714, was concerned with the power of the donee to transfer or terminate his interest in the partnership and the Court concluded that the taxpayer remained the substantial owner of the property purportedly given away.

The transferee must receive dominion and control of the partnership interest. Treasury Regulations 118 (1939 Code), Section 39.191-1 (3); Treasury Regulations (1954 Code), Section 1.704-1 (e)(iii). Income is not taxed as intended to be earned but as actually earned. And Congress did not intend to change this rule with either Section 671 (Appendix A, *infra*) or Section 704 (e) of the Internal Revenue Code. See H. Rep. No. 1337, 83rd Cong., 2d Sess., pp. A 211, A 212 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4352). (Recommending enactment of Section 671.) (Appendix A, *infra*.)

H. Rep. No. 586, 82d Cong., 1st Sess., p. 33 (1951-2 Cum. Bull. 357, 381) (recommending amendment of

Section 3797(a)(2) of, and adding Section 191 to the 1939 Code, now Section 704(e) of the 1954 Code), states:

The amendment leaves the Commissioner and the courts free to inquire in any case whether the donee or purchaser actually owns the interest in the partnership which the transferor purports to have given or sold him. Cases will arise where the gift or sale is a mere sham. *Other cases* will arise where the transferor retains so many of the incidents of ownership that he will continue to be recognized as a substantial owner of the interest which he purports to have given away, as was held by the Supreme Court in an analogous trust situation involved in the case of *Helvering v. Clifford*, * * *. (Emphasis supplied.)

And in *Spiesman v. Commissioner*, 260 F. 2d 940, 948, this Court made it plain that the law did not delete the requirement that the donor must, "in fact," relinquish dominion and control over the purported gifts. Under principles of *Helvering v. Clifford*, the income of the instant trusts is taxable to the taxpayers.

In the instant case, the trustees obtained only such dominion and control of the purportedly transferred property which the taxpayers, as managing partners of the family partnership and as controllers of the contracting corporation, would grant them.

The trustees did possess some powers exercisable for the benefit of the beneficiaries as distinguished from those vested in the taxpayers for their own bene-

fit, but these powers attached not to the property but only to the income which taxpayers allowed the partnership to receive and only the portions of such income allocated by taxpayers to the trust. All the facts and circumstances which require this conclusion have been set out previously and will not be repeated. In conclusion, taxpayers not only failed to offer sufficient evidence that they in good faith intended to join together in partnership with themselves as separate and independent trustees, but they also failed to offer sufficient evidence of a vesting of dominion and control over the property in themselves as fiduciaries.

VIII

THE PROVISIONS OF THE TRUSTS PERMIT DISTRIBUTION OF INCOME TO THE GRANTORS

The practical circumstances of the trust instruments and the relation of the grantors and respective trustees to each other must be afforded consideration. Here the trusts were essentially reciprocal; the grantor of one was the trustee of the other and both were in business with each other and purportedly sought to bring the trusts into the same business. Broad discretion is conferred by the trust instruments on the trustees, but the genuineness of the trusts and the reality of the discretion are brought into serious question when it is realized that in practice the wishes and acts of

one trustee or grantor might readily become a *quid pro quo* for acts and wishes of the other. (See R. 250, 251, 305, 306.) This situation becomes even more pointed when attention is directed to the provision of each of the trusts which allows the respective trustees, during such time as an income beneficiary is under twenty-one years of age, to pay income to the parents of the beneficiary for the use and benefit of the beneficiary "without any responsibility for the application thereof by such guardian or parent * * *." (Ex. 1, R. 362; Ex. 2, R. 373-374.) In the same section of each of the trusts the respective trustees are authorized to use net income "towards the maintenance, education, enjoyment, health and welfare" of the beneficiary. Thus, inferably the parent-grantor certainly may use the income for any such purposes, including enjoyment. The point to be emphasized is, however, that thereby the trust income may be paid back to the respective grantors for their use as they see fit substantially not subject to any supervision. The respective instruments do not require supervision by the trustees and in this situation of close relationship and of reciprocal trusts it seems certain that the grantor-parents would not be subject to any real restrictions in their use of the income. Not only do the realities of this situation throw grave doubt upon the genuineness of the trusts, but they serve as a basis for contending that

the respective grantors should be treated as the owners of the trusts within the meaning of Section 677 of the Internal Revenue Code of 1954 (Appendix A, *infra*) (substantially identical to Section 167 of the Internal Revenue Code of 1939). Nor does the exception contained in Section 677 (b) apply here, for as the Treasury Regulations on Income Tax (1954 Code) provide (Section 1.677(b)-1(e) :

(e) The general rule of Section 677(a), and not Section 677(b), is applicable if discretion to apply or distribute income of a trust rests solely in the grantor, or in the grantor in conjunction with other persons, unless in either case the grantor has such discretion as trustee or co-trustee.

S. Rep. No. 627, 78th Cong., 1st Sess., p. 68 (1944 Cum. Bull. 973, 1023) is to the same effect. In the case of these trusts the discretion by the respective grantor-parents to apply or distribute income is not conferred upon each as trustee of the trusts of which each respectively is grantor. Considering that the trusts were set up with tax avoidance in mind, the loophole which the provisions of the trust instruments affords for distribution of income to the grantors cannot be overlooked.

In summary then, the possibility that income may be distributed to the grantors to be applied in their discretion seriously reflects upon the genuineness of

these reciprocal trusts and on this record and, in the light of the provisions of Section 677 and its earlier cognate, constitutes additional ground for sustaining the ruling that the grantors should here be treated as owners of the respective trusts.

CONCLUSION

For the reasons given above, the decision of the District Court is correct and should be affirmed.

Respectfully submitted,

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APPENDIX A

Internal Revenue Code of 1939:

SEC. 167. INCOME FOR BENEFIT OF
GRANTOR.

(a) Where any part of the income of a trust—

(1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or

(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; or

(3) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in section 23(o), relating to the so-called "charitable contribution" deduction);

then such part of the income of the trust shall be included in computing the net income of the grantor.

(b) As used in this section the term "in the discretion of the grantor" means "in the discretion of the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of the part of the income in question."

(c) [as added by Sec. 134(a) of the Revenue Act of 1943, c. 63, 58 Stat. 21] Income of a trust shall not be considered taxable to the grantor under subsection (a) or any other provision of this chapter merely because such income, in the discretion of another person, the trustee, or the grantor acting as trustee or co-trustee may be applied or distributed for the support or maintenance of a beneficiary whom the grantor is legally obligated to support or maintain, except to the extent that such income is so applied or distributed. In cases where the amounts so applied or distributed are paid out of corpus or out of other than income for the taxable year, such amounts shall be considered paid out of income to the extent of the income of the trust for such taxable year which is not paid, credited, or to be distributed under section 162 and which is not otherwise taxable to the grantor.

(26 U.S.C. 1952 ed., Sec. 167.)

SEC. 191 [as added by Sec. 340(b) of the Revenue Act of 1951, c. 521, 65 Stat. 452]. FAMILY PARTNER-SHIPS.

In the case of any partnership interest created by gift, the distributive share of the donee under the partnership agreement shall be includible in his gross income, except to the extent that such share is determined without allowance of reasonable compensation for services rendered to the partnership by the donor, and except to the extent that the portion of such share attributable to donated capital is proportionately greater than the share of the donor attributable to the donor's capital. The distributive share of a partner in the earnings of the partnership shall not be diminished because of absence due to military service.

For the purpose of this section, an interest purchased by one member of a family from another shall be considered to be created by gift from the seller, and the fair market value of the purchased interest shall be considered to be donated capital. The "family" of any individual shall include only his spouse, ancestors, and lineal descendants, and any trust for the primary benefit of such persons.

(26 U.S.C. 1952 ed., Sec. 191.)

SEC. 3797. DEFINITIONS

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * *

(2) [as amended by Sec. 340(a) of the Revenue Act of 1951, *supra*]. *Partnership and Partner*.—The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization. A person shall be recognized as a partner for income tax purposes if he owns a capital interest in a partnership in which capital is a material income-producing factor, whether or not such interest was derived by purchase or gift from any other person.

* * * *

(26 U.S.C. 1952 ed., Sec. 3797.)

Internal Revenue Code of 1954:

SEC. 671. TRUST INCOME, DEDUCTIONS,
AND CREDITS ATTRIBUTABLE
TO GRANTORS AND OTHERS AS
SUBSTANTIAL OWNERS.

Where it is specified in this subpart that the grantor or another person shall be treated as the owner of any portion of a trust, there shall then be included in computing the taxable income and credits of the grantor or the other person those items of income, deductions, and credits against tax of the trust which are attributable to that portion of the trust to the extent that such items would be taken into account under this chapter in computing taxable income or credits against the tax of an individual. Any remaining portion of the trust shall be subject to subparts A through D. No items of a trust shall be included in computing the taxable income and credits of the grantor or of any other person solely on the grounds of his dominion and control over the trust under section 61 (relating to definition of gross income) or any other provision of this title, except as specified in this subpart.

(26 U.S.C. 1958 ed., Sec. 671.)

SEC. 677. INCOME FOR BENEFIT OF
GRANTOR.

(a) *General Rule.*—The grantor shall be treated as the owner of any portion of a trust, whether or not he is treated as such owner under section 674, whose income without the approval or consent of any adverse party is, or, in the discretion of the grantor or a non-adverse party, or both, may be—

(1) distributed to the grantor;

- (2) held or accumulated for future distribution to the grantor; or
- (3) applied to the payment of premiums on policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for a purpose specified in section 170(c) (relating to definition of charitable contributions)).

* * * *

(b) *Obligations of Support*.—Income of a trust shall not be considered taxable to the grantor under subsection (a) or any other provision of this chapter merely because such income in the discretion of another person, the trustee, or the grantor acting as trustee or co-trustee, may be applied or distributed for the support of maintenance of a beneficiary whom the grantor is legally obligated to support or maintain, except to the extent that such income is so applied or distributed. * * *

(26 U.S.C. 1958 ed., Sec. 677.)

SEC. 704. PARTNER'S DISTRIBUTIVE SHARE.

(a) *Effect of Partnership Agreement*.—A partner's distributive share of income, gain, loss, deduction, or credit shall, except as otherwise provided in this section, be determined by the partnership agreement.

(b) *Distributive Share Determined by Income or Loss Ratio*. — A partner's distributive share of any item of income, gain, loss, deduction, or credit shall be determined in accordance with his distributive share of taxable income or loss of the partnership, as described in section 702(a)-(9), for the taxable year, if—

(1) the partnership agreement does not provide as to the partner's distributive share of such item, or

(2) the principal purpose of any provision on the partnership agreement with respect to the partner's distributive share of such item is the avoidance or evasion of any tax imposed by this subtitle.

* * * *

(e) *Family Partnerships*—

(1) *Recognition of interest created by purchase or gift.*—A person shall be recognized as a partner for purposes of this subtitle if he owns a capital interest in a partnership in which capital is a material income-producing factor, whether or not such interest was derived by purchase or gift from any other person.

* * * *

(26 U.S.C. 1958 ed., Sec. 704.)

Treasury Regulations on Income Tax (1954 Code):

Section 1.704.1. PARTNER'S DISTRIBUTIVE SHARE.

* * * *

(b) *Distributive share determined by income or loss ratio.*

* * * *

(2) If the principal purpose of any provision in the partnership agreement determining a partner's distributive share of a particular item is to avoid or evade the Federal income tax, the provision shall be disregarded and the partner's distributive shares of that item shall be determined in accordance with the ratio in which the partners

divide the general profits or losses of the partnership (as described in section 702(a)(9)). In determining whether the principal purpose of any provision in the partnership agreement for a special allocation is the avoidance or evasion of Federal income tax, the provision must be considered in relation to all the surrounding facts and circumstances. Among the relevant circumstances are the following: Whether the partnership or a partner individually has a business purpose for the allocation; whether the allocation has "substantial economic effect", that is, whether the allocation may actually affect the dollar amount of the partners' shares of the total partnership income or loss independently of tax consequences; whether related items of income, gain, loss, deduction, or credit from the same source are subject to the same allocation; whether the allocation was made without recognition of normal business factors and only after the amount of the specially allocated item could reasonably be estimated; the duration of the allocation; and the overall tax consequences of the allocation. * * *

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(e) *Family partnerships*—(1) *In general*—
 (i) *Introduction*. The production of income by a partnership is attributable to the capital or services, or both, contributed by the partners. The provisions of subchapter K, chapter 1 of the Code, are to be read in the light of their relationship to section 61, which requires, inter alia, that income be taxed to the person who earns it through his own labor and skill and the utilization of his own capital.

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(iii) *Requirement of complete transfer to donee*. A donee or purchaser of a capital interest in a partnership is not recognized as a partner

under the principles of section 704(e)(1) unless such interest is acquired in a bona fide transaction, not a mere sham for tax avoidance or evasion purposes, and the donee or purchaser is the real owner of such interest. To be recognized, a transfer must vest dominion and control of the partnership interest in the transferee. The existence of such dominion and control in the donee is to be determined from all the facts and circumstances. A transfer is not recognized if the transferor retains such incidents of ownership that the transferee has not acquired full and complete ownership of the partnership interest. Transactions between members of a family will be closely scrutinized, and the circumstances, not only at the time of the purported transfer but also during the periods preceding and following it, will be taken into consideration in determining the bona fides or lack of bona fides of the purported gift or sale. A partnership may be recognized for income tax purposes as to some partners but not as to others.

* * * *

(2) *Basic tests as to ownership*—(i) *In general.* Whether an alleged partner who is a donee of a capital interest in a partnership is the real owner of such capital interest, and whether the donee has dominion and control over such interest, must be ascertained from all the facts and circumstances of the particular case. Isolated facts are not determinative; the reality of the donee's ownership is to be determined in the light of the transaction as a whole. The execution of legally sufficient and irrevocable deeds or other instruments of gift under State law is a factor to be taken into account but is not determinative of ownership by the donee for the purposes of section 704(e). The reality of the transfer and of the donee's ownership of the property attributed to him are to be ascertained from the conduct of the parties with

respect to the alleged gift and not by any mechanical or formal test. Some of the more important factors to be considered in determining whether the donee has acquired ownership of the capital interest in a partnership are indicated in subdivisions (ii) to (x), inclusive, of this subparagraph.

(ii) *Retained controls.* The donor may have retained such controls of the interest which he has purported to transfer to the donee that the donor should be treated as remaining the substantial owner of the interest. Controls of particular significance include, for example, the following:

(a) Retention of control of the distribution of amounts of income or restrictions on the distributions of amounts of income (other than amounts retained in the partnership annually with the consent of the partners, including the donee partner, for the reasonable needs of the business). If there is a partnership agreement providing for a managing partner or partners, then amounts of income may be retained in the partnership without the acquiescence of all the partners if such amounts are retained for the reasonable needs of the business.

(b) Limitation of the right of the donee to liquidate or sell his interest in the partnership at his discretion without financial detriment.

(c) Retention of control of assets essential to the business (for example, through retention of assets leased to the alleged partnership).

(d) Retention of management powers inconsistent with normal relationships among partners. Retention by the donor of control of business management or of voting control, such as is common in ordinary business relationships, is not by itself to be considered as inconsistent with normal rela-

tionships among partners, provided the donee is free to liquidate his interest at his discretion without financial detriment. The donee shall not be considered free to liquidate his interest unless, considering all the facts, it is evident that the donee is independent of the donor and has such maturity and understanding of his rights as to be capable of deciding to exercise, and capable of exercising, his right to withdraw his capital interest from the partnership.

The existence of some of the indicated controls, though amounting to less than substantial ownership retained by the donor, may be considered along with other facts and circumstances as tending to show the lack of reality of the partnership interest of the donee.

(iii) *Indirect controls.* Controls inconsistent with ownership by the donee may be exercised indirectly as well as directly, for example, through a separate business organization, estate, trust, individual, or other partnership. Where such indirect controls exist, the reality of the donee's interest will be determined as if such controls were exercisable directly.

(iv) *Participation in management.* Substantial participation by the donee in the control and management of the business (including participation in the major policy decisions affecting the business) is strong evidence of a donee partner's exercise of dominion and control over his interest. Such participation presupposes sufficient maturity and experience on the part of the donee to deal with the business problems of the partnership.

(v) *Income distributions.* The actual distribution to a donee partner of the entire amount or a major portion of his distributive share of the business income for the sole benefit and use of the donee is substantial evidence of the reality of the

donee's interest, provided the donor has not retained controls inconsistent with real ownership by the donee. Amounts distributed are not considered to be used for the donee's sole benefit if, for example, they are deposited, loaned, or invested in such manner that the donor controls or can control the use or enjoyment of such funds.

(vi) *Conduct of partnership business.* In determining the reality of the donee's ownership of a capital interest in a partnership, consideration shall be given to whether the donee is actually treated as a partner in the operation of the business. Whether or not the donee has been held out publicly as a partner in the conduct of the business, in relations with customers, or with creditors or other sources of financing, is of primary significance. Other factors of significance in this connection include:

(a) Compliance with local partnership, fictitious names, and business registration statutes.

(b) Control of business bank accounts.

(c) Recognition of the donee's rights in distributions of partnership property and profits.

(d) Recognition of the donee's interest in insurance policies, leases, and other business contracts and in litigation affecting business.

(e) The existence of written agreements, records, or memoranda contemporaneous with the taxable year or years concerned, establishing the nature of the partnership agreement and the rights and liabilities of the respective partners.

(f) Filing of partnership tax returns as required by law.

However, despite formal compliance with the above factors, other circumstances may indicate that the donor has retained substantial ownership

of the interest purportedly transferred to the donee.

(vii) *Trustees as partners.* A trustee may be recognized as a partner for income tax purposes under the principles relating to family partnerships generally as applied to the particular facts of the trust-partnership arrangement. A trustee who is unrelated to and independent of the grantor, and who participates as a partner and receives distribution of the income distributable to the trust, will ordinarily be recognized as the legal owner of the partnership interest which he holds in trust unless the grantor has retained controls inconsistent with such ownership. However, if the grantor is the trustee, or if the trustee is amenable to the will of the grantor, the provisions of the trust instrument (particularly as to whether the trustee is subject to the responsibilities of a fiduciary), the provisions of the partnership agreement, and the conduct of the parties must all be taken into account in determining whether the trustee in a fiduciary capacity has become the real owner of the partnership interest. Where the grantor (or person amenable to his will) is the trustee, the trust may be recognized as a partner only if the grantor (or such other person) in his participation in the affairs of the partnership actively represents and protects the interests of the beneficiaries in accordance with the obligations of a fiduciary and does not subordinate such interests to the interests of the grantor. Furthermore, if the grantor (or person amenable to his will) is the trustee, the following factors will be given particular consideration:

(a) Whether the trust is recognized as a partner in business dealings with customers and creditors, and

(b) Whether, if any amount of the partner-

ship income is not properly retained for the reasonable needs of the business, the trust's share of such amount is distributed to the trust annually and paid to the beneficiaries or reinvested with regard solely to the interests of the beneficiaries.

* * * *

(x) *Motive*. If the reality of the transfer of interest is satisfactorily established, the motives for the transaction are generally immaterial. However, the presence or absence of a tax-avoidance motive is one of many factors to be considered in determining the reality of the ownership of a capital interest acquired by gift.

* * * *

The provisions of Section 39.191-1 of Treasury Regulations 118 (1939 Code) are substantially the same as those of Section 1.704-1(e) set out above.

H. Rep. No. 1337, 83rd Cong., 2d Sess., pp. A 211, A 212 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4352):

Section 671. *Trust income, deductions, and credits attributable to grantors and others as substantial owners.*

* * * *

It is also provided in this section that no items of a trust shall be included in computing the income or credits of the grantor (or another person) solely on the grounds of his dominion and control over the trust under the provisions of section 61 (corresponding to sec. 22(a) of existing law). The effect of this provision is to insure that taxability of *Clifford* type trusts shall be governed solely by this subpart. However, this pro-

vision does not affect the principles governing the taxability of income to a grantor or assignor other than by reason of his dominion and control over the trust. Thus, this subpart has no application in situations involving assignments of future income to the assignor, as in *Lucas v. Earl* (281 U.S. 111), *Harrison v. Schaffner* (312 U.S. 579), and *Helvering v. Horst* (311 U.S. 112), whether or not the assignment is to a trust; nor are the rules as to family partnerships affected by this subpart.

APPENDIX B

EXHIBITS⁶

<u>Exhibit No.</u>	<u>Description</u>	<u>Pages</u>
24	Agreement dated February 11, 1952, between Max J. Kuney, Sr., and Max J. Kuney, Jr., as trustee with respect to division of profits.....	69
25	Agreement dated February 11, 1952, between Max J. Kuney, Jr., and Max J. Kuney, Sr., as trustee with respect to division of profits.....	69
28	Letter from Max J. Kuney, Jr., to Inheritance Tax Division, Washington State Tax Commissioner, dated April 7, 1953.....	70, 71, 72, 73
30	Financial statements of Max J. Kuney Company for year ended December 31, 1952.....	74, 75, 76, 77
31	Financial statements of Max J. Kuney Company for year ended December 31, 1953....	78, 79, 80
32	Financial statements of Max J. Kuney Company for year ended December 31, 1954....	81, 82, 83

⁶ The exhibits are reproduced only in part.

33	Rental Agreement dated May 14, 1953, between Max J. Kuney Company, a partnership, and Max J. Kuney Company, a corporation....	84
34	Certified copy of Certificates of Firm Name filed by Max J. Kuney Company, dated July 2, 1945	86
35	Certified copy of Certificate of Firm Name filed by Max J. Kuney Company, dated March 27, 1953.....	87
A	1957 Partnership Tax Return.....	88
G	Bible JV4 (Partnership Agreement, Journal Entry and 1955 Income Tax Computation)....	88, 89
Q	Corporate Minutes and Stock Record—Max J. Kuney Company:	
	Minutes of special meetings of shareholders, directors, and officers of Max J. Kuney Company, Inc.—March 20, 1956.....	90
	Minutes of the annual meeting of the stockholders of Max J. Kuney Company—May 1, 1956.....	92
	Minutes of special meeting of shareholders, directors, and officers of Max J. Kuney Company—February 7, 1957.....	93
	Minutes of a special meeting of the directors of Max J. Kuney Company—February 6, 1958	95, 96
R	Financial Statement of Max J. Kuney Company to Dun & Bradstreet, Inc. — May 1, 1956:	
	General Statement of Max J. Kuney Company—December 31, 1955.....	96, 97, 98

EXHIBIT 24

AGREEMENT

The undersigned hereby agree that effective January 1, 1952, total Max J. Kuney income shall be distributed annually between Max J. Kuney and Trust Dated February 11, 1952, for Benefit of John R. Kuney, as provided by the rules of law then effective for family partnerships and in conformity with the provisions of said Trust.

Signed this 11th day of February, 1952.

MAX J. KUNEY

MAX J. KUNEY, JR.

Trust for Benefit of John R. Kuney

By: Max Kuney, Jr., Trustee

EXHIBIT 25

AGREEMENT

The undersigned hereby agree that effective January 1, 1952, total Max Kuney, Jr., income shall be distributed annually between Max Kuney, Jr., and Trusts Dated February 11, 1952, for Benefit of Max J. Kuney III and Caroline I. Kuney, as provided by the rules of law then effective for family partnerships and in conformity with the provisions of said Trusts.

Signed this 11th day of February, 1952.

MAX J. KUNEY, JR.

MAX J. KUNEY

Trust for Benefit of Max J. Kuney III

By: Max J. Kuney, Trustee

MAX J. KUNEY

Trust for Benefit of Caroline I. Kuney

By: Max J. Kuney, Trustee

EXHIBIT 28

April 7, 1953

State of Washington
Inheritance Tax Division
Tax Commission
Olympia, Washington

Attention: Mr. Harry F. Wood, Deputy Supervisor

Dear Sir:

In reply to your letter of March 19, 1953, relative to gifts in trust made by Max J. Kuney and the community of Max Kuney, Jr., and Constance K. Kuney.

Enclosed are separate donor's returns for Max Kuney, Jr. and Constance K. Kuney, together with completed matching donee returns, as requested in the second paragraph of your letter.

Also enclosed is one copy of the trust agreement under which the gift of Max J. Kuney was made, and one copy of the trust agreement under which the gift of Max Jr. and Constance K. Kuney was made, as requested in the fourth paragraph of your letter.

In regards to information requested in the fifth paragraph of your letter:

The Max J. Kuney Company is a partnership with operating divisions for four types of construction work. For trade reasons these divisions are operated under the different names — Max J. Kuney Company (Heavy Construction Division), Kuney Johnson Company (Building Division), Agutter Electric Company (Electric Division), and Tecler Aluminum Products (Manufacturing Division).

Max J. Kuney and Max Kuney, Jr., are the only partners and equal partners in the Max J. Kuney Company.

EXHIBIT 28

COPY

State of Washington, Inheritance Tax Division, Olympia, Wn.
April 7, 1953

The Max J. Kuney Company has 100% interest in all assets and operations held or undertaken in its own name. In addition, the Max J. Kuney Company has 50% interest with Lloyd W. Johnson in both Kuney Johnson Company and Tecler Aluminum Products and 50% interest with C. S. Greene in Agutter Electric Company.

In the case of both donor Max J. Kuney and Max Kuney, Jr. with co-donor Constance K. Kuney, the facts of the transfer were that \$100,000.00 was withdrawn from the capital accounts of each donor and deposited to the credit of the appropriate trustee as provided by the enclosed trust agreement copies.

The percentage of his interest in the businesses transferred in trust by Max J. Kuney are as follows:

Total Capital Max J. Kuney after	
Trust Establishment	\$507,815.16 — 83.55%
Total Capital Max Kuney, Jr., Trustee after	
Trust Establishment	\$100,000.00 — 16.45%
Total Capital Before Trust Establishment	<u>\$607,815.16 — 100%</u>

The percentage of his interests in the businesses transferred in trust by Max Kuney, Jr., with co-donor Constance K. Kuney are as follows:

Total Capital Max Kuney, Jr. After	
Trust Establishment	\$398,635.47 — 79.95%
Total Capital, Max J. Kuney, Trustee,	
After Trust Establishment	\$100,00.00 — 20.05%
Total Capital Before Trust Establishment	<u>\$498,635.47 — 100%</u>

Profits are divided between partner Max J. Kuney and the trust he established and partner Max Kuney, Jr., and the trust he and co-donor Constance K. Kuney established in accordance with the above formula, but after reduction of divisible profits by allowance of salary for personal services direct to Max J. Kuney and Max Kuney, Jr.

EXHIBIT 28

State of Washington, Inheritance Division, Olympia, Wn.

April 7, 1953

Enclosed is a copy of the balance sheet contained in our certified financial statement of December 31, 1951, which is the balance sheet prepared closest to the date of the gift as requested in the sixth paragraph of your letter. This is a consolidated balance sheet of the Max J. Kuney Company and its operating divisions, and the net worth shown thereon is the total net worth of all partners in all divisions.

The net earnings of the Max J. Kuney Company from its own operations and the total net earnings of the operating divisions, before taxes and the distributions to partners, for the ten years preceding the gift are as follows:

<u>Year</u>	<u>Max J. Kuney Co.</u>	<u>Kuney Johnson Co.</u>	<u>Agutter Electric Co.</u>	<u>Tecler Aluminum</u>	<u>Consolidated</u>
1942	278,570.71	102,467.34			381,038.05
1943	238,941.47	4,629.48			243,570.95
1944	88,504.55	76,961.32	16,924.70		182,390.57
1945	(22,255.34)	105,978.40	121,540.25		205,263.31
1946	92,332.45	190,747.28	70,077.37		353,157.10
1947	130,680.23	184,354.68	46,618.30	(52,882.74)	308,770.47
1948	152,378.19	119,051.14	24,657.72	(18,305.49)	277,781.56
1949	204,774.09	74,625.76	6,338.52	4,944.42	290,682.79
1950	222,960.70	77,237.48	3,914.30	13,657.12	317,769.60
1951	495,611.18	222,401.15	32,393.09	36,462.96	786,868.38
<u>Totals</u>	<u>\$1,882,498.23</u>	<u>\$1,158,454.03</u>	<u>\$322,464.25</u>	<u>(\$16,123.73)</u>	<u>\$3,347,292.78</u>

We trust the above is the information desired.

Yours very truly,

MAX J. KUNEY COMPANY

Max Kuney, Jr.

MK:ms

Encls. Copy of Trust Agreement
Donors Returns (copy)

EXHIBIT 28

MAX J. KUNEY COMPANY AND OPERATING DIVISIONS
 KUNEY JOHNSON COMPANY - AGUTTER ELECTRIC COMPANY
 TECLER ALUMINUM PRODUCTS
 BALANCE SHEETS AS OF DECEMBER 31, 1951

COPY

	<u>MKJ Co.</u>	<u>K-J Co.</u>	<u>Agutter</u>	<u>Tecler</u>	<u>Consolidated</u>
	ASSETS				
Cash	265,949.71	3,381.88	34,943.69	1,025.00	305,300.28
Contract Accounts Receivable	582,194.01	384,771.43	98,453.94	22,108.40	1,087,527.78
Commercial Accounts Receivable	242,667.80	51,835.31	22,429.94	117,664.16	434,597.21
Unbilled Work					
Accounts Receivable	368.28	10,110.28	830.54	3,421.51	14,730.61
Inventories			92,578.18	104,942.12	197,520.30
Prepaid Items	10,689.64	12,096.50			22,786.14
United States Bonds	11,250.00				11,250.00
Total Liquid Assets	<u>1,113,119.44</u>	<u>462,195.40</u>	<u>249,236.29</u>	<u>249,161.19</u>	<u>2,073,712.32</u>
Notes Receivable	65,787.46			2,100.00	67,887.46
Equipment:					
Book Value	288,159.80	72,452.77	24,961.04	13,829.62	399,403.23
Land & Buildings:					
Book Value	13,343.86	85,980.61			99,324.47
Total External Assets	<u>1,480,410.56</u>	<u>620,628.78</u>	<u>274,197.33</u>	<u>265,090.81</u>	<u>2,640,327.48</u>
Internal Accts. Rec.					
Kuney Johnson Co.	107,064.35				107,064.35
Agutter Electric Co.	203,757.00				203,757.00
Tecler Aluminum Products	190,626.27	18,231.48			208,857.75
Total Assets	<u>1,981,858.18</u>	<u>638,860.26</u>	<u>274,197.33</u>	<u>265,090.81</u>	<u>3,160,006.58</u>
LIABILITIES AND NET WORTH					
Bank Drafts					
Outstanding	139,260.13	163,041.43	36,760.81	29,150.56	368,212.93
Accounts Payable					
Commercial	131,642.75	18,485.11		22,509.68	172,637.54
Subcontractors	139,287.00	60,775.31	11,962.88	4,572.82	216,598.01
P/R & Bus. Taxes	18,690.23	5,246.39			23,936.62
Income Taxes	446,527.44	65,593.48	635.20		512,756.12
Total External Liabilities	<u>875,407.55</u>	<u>313,141.72</u>	<u>49,358.89</u>	<u>56,233.06</u>	<u>1,294,141.22</u>
Internal Accts. Pay.					
Kuney Johnson Co.		107,064.35		18,231.48	125,295.83
Agutter Electric Co.			203,757.00		203,757.00
Tecler Aluminum Products				190,626.27	190,626.27
Total Liabilities	<u>875,407.55</u>	<u>420,206.07</u>	<u>253,115.89</u>	<u>265,090.81</u>	<u>1,813,820.32</u>
Capital After 1951 Taxes					
Max J. Kuney	607,815.16				607,815.16
Max Kuney, Jr.	498,635.47				498,635.47
Lloyd W. Johnson		218,654.19			218,654.19
C. S. Greene			21,081.44		21,081.44
Total Net Worth	<u>1,106,450.63</u>	<u>218,654.19</u>	<u>21,081.44</u>		<u>1,346,186.26</u>
Total Liabilities And Net Worth	<u>1,981,858.18</u>	<u>638,860.26</u>	<u>274,197.33</u>	<u>265,090.81</u>	<u>3,160,006.58</u>

EXHIBIT 30

MAX J. KUNEY COMPANY
CONTRACTORS

EXECUTIVE OFFICE NORTH 120 RALPH
 SPOKANE, WASHINGTON

MEMBER
 ASSOCIATED GENERAL CONTRACTORS
 OF AMERICA

December 31, 1952

GENERAL STATEMENT

TRADE STYLE: Max J. Kuney Company is a partnership with operating divisions for four types of construction work. For trade reasons these divisions are operated under different names as follows:

H	Max J. Kuney Company 120 North Ralph St., Spokane	Heavy Construction Division
B	Kuney Johnson Company 235 Ninth Ave. No., Seattle	Building Division
E	Agutter Electric Company 5500 14th Ave. N. W., Seattle	Electrical Division
M	Tecler Aluminum Products 625 Yale Ave. No., Seattle	Manufacturing Division

HISTORY: The business was founded to do highway and heavy construction work in 1930 by Max J. Kuney. In 1940 his son, Max Kuney, Jr., became a general partner and they then started doing building and electrical work in a small way. In 1941 they started a separate Building Division and in 1944 they started a separate Electrical Division. In 1946 they started the Manufacturing Division.

THE PARTNERS: Max J. Kuney, age 58, and Max J. Kuney, Jr., age 34, are equal partners and general partners in all divisions. Lloyd W. Johnson, age 42, is a special partner, having 50% interest with the Kuneys in the Building and Manufacturing Divisions, and C. S.

Greene, age 44, is a special partner having 50% interest with the Kuneys in the Electrical Division. From earnings partially retained in the business the Kuneys have \$1,255,039.44, Lloyd W. Johnson has \$210,073.35 and C. S. Greene \$51,158.38, invested in the business. None of the partners' personal assets held outside the business are included above. All the partners are active and work full time in the business. Max Kuney, Jr., manages the Heavy Construction Division in Spokane and Max J. Kuney with special partners Johnson and Greene, manages the three other divisions in Seattle.

RESOURCES: The partners' capital after payment of 1952 income taxes is \$1,516,271.17. Liquid Assets are 1.4 times Total Liabilities. Net Liquid Assets total \$646,433.70. Fixed Assets, except \$91,873.47 in notes, are all in equipment, land and buildings used directly in the business with a book value of \$777,964.06 after deduction of \$839,651.95 depreciation reserves.

PLANT AND EQUIPMENT: The Heavy Construction Division occupies a square block which the firm owns in Spokane. The property consists of office, shop and store buildings and a railroad spur with loading dock with all remaining area paved. The firm also owns three-quarters of the block bounded by Yale, Mercer, Pontius and Roy in Seattle where the Manufacturing Division has had its plant since 1948. In 1952 the size of the Manufacturing Plant was doubled and construction was started on the balance of the property to provide office and warehouse space for the Building Division with surplus space available for rental to tenants. Pending completion of these additions, the Building Division continues as a tenant in the quarters at 235 Ninth Avenue North, which were sold to a private investor in 1952. One half block cornering on Fourteenth Avenue and Market Street in Seattle containing a modern two story office, shop and warehouse building plus fenced and paved open storage area was purchased in 1952 to provide new headquarters for the Electrical Division. The firm owns 238 pieces of major equipment having an original cost of \$1,331,407.12, which it uses in its business of heavy grading and excavating, rock crushing, paving, general building and electrical contracting and light manufacturing.

EXHIBIT 30

MAX J. KUNEY COMPANY
CONSOLIDATED BALANCE SHEET AS OF
DECEMBER 31, 1952

ASSETS

Cash in Banks and In Transit to Banks—Schedule "A"		151,031.99
Contract Accounts Receivable, Current—Schedule "B"	560,867.71	
Contract Accounts Receivable, Retainage—Schedule "B"	<u>488,611.47</u>	1,049,479.18
Commercial Accounts Receivable—Schedule "C"		572,473.07
Unbilled Work Accounts Receivable—Schedule "D"		61,091.53
Inventories—Schedule "E"		344,116.21
Prepaid Items—Schedule "F"		18,182.98
United States Bonds at Cost		<u>11,250.00</u>
Total Liquid Assets		2,207,624.96
Notes Receivable—Schedule "G"		91,873.41
Machinery and Equipment—Schedule "H"		
Purchase Price of Equipment Owned	1,331,407.12	
Less Depreciation Reserved	<u>819,653.22</u>	511,753.90
Land and Buildings Held for Business Use—Schedule "I"		
Purchase Price of Land and Buildings Owned	286,208.89	
Less Depreciation Reserved	<u>19,998.73</u>	266,210.16
Total Assets		<u>3,077,462.43</u>

LIABILITIES, RESERVES AND NET WORTH

Bank Drafts Outstanding	383,801.94	
Accounts Payable, Commercial	43,452.32	
Accounts Payable, Payroll and Business Taxes	43,918.17	
Accounts Payable, 1952 Income Taxes	<u>351,032.68</u>	822,205.11
Accounts Payable, Subcontractors, Retainage		334,094.70
Notes Payable, S & E Division, Seattle-1st National Bank		200,000.00
RESERVE: Capital of Special Partners		
W. R. Wiginton—Superintendent Heavy Const. Div.	86,605.69	
S. O. Claggett—Superintendent Spokane Bldg. Div.	24,068.95	
W. B. Petersen—Manager, Spokane Office	7,875.15	
Erickson & Munson—Joint Venturers Electrical Div.	58,467.25	
W. H. Page—Manufacturing Division	<u>14,750.90</u>	191,767.94
RESERVE: Deferred Income		<u>13,123.51</u>
TOTAL LIABILITIES AND RESERVES		1,561,191.26
GENERAL PARTNERS' NET WORTH		
AFTER 1952 INCOME TAXES		<u>1,516,271.17</u>
TOTAL LIABILITIES, RESERVES AND		
NET WORTH		<u>3,077,462.43</u>
CONTINGENT LIABILITIES		NONE

EXHIBIT 30

MAX J. KUNEY COMPANY AND OPERATING DIVISIONS
KUNEY JOHNSON COMPANY, AGUTTER ELECTRIC COMPANY,
TECLER ALUMINUM PRODUCTS

BALANCE SHEET AS OF DECEMBER 31, 1952

	<u>MJK CO.</u>	<u>K-J CO.</u>	<u>Agutter</u>	<u>Tecler</u>	<u>Consolidated</u>
	ASSETS				
Cash in Banks and in Transit	21,031.46	103,353.36	16,802.05	9,845.12	151,031.99
Contract Accounts Receivable	546,225.95	190,558.73	312,694.50		1,049,479.18
Commercial Accounts Receivable	299,210.25	46,314.48	12,767.31	214,181.03	572,473.07
Unbilled Work Accounts Receivable			13,965.90	47,125.63	61,091.53
Inventories			187,732.01	156,384.20	344,116.21
Prepaid Items	15,367.13	2,051.00	764.85		18,182.98
United States Bonds	11,250.00				11,250.00
Total Liquid Assets	893,084.79	342,277.57	544,726.62	427,535.98	2,207,624.96
Notes Receivable	74,395.42		15,377.99	2,100.00	91,873.41
Equipment:					
Book Value	367,044.73	82,525.02	45,529.99	16,654.16	511,753.90
Land and Buildings:					
Book Value:	12,836.94	197,725.66	55,647.56		266,210.16
Total External Assets	1,347,361.88	622,528.25	661,282.16	446,290.14	3,077,462.43
Internal Accts. Rec.					
Kuney Johnson Co.	61,929.65				61,929.65
Agutter Electric Co.	487,250.48				487,250.48
Tecler Aluminum Products	403,522.86				403,522.86
Total Assets	2,300,064.87	622,528.25	661,282.16	446,290.14	4,030,165.42
LIABILITIES, RESERVES AND NET WORTH					
Bank Drafts Outstanding	120,294.77	225,271.42	16,656.43	21,579.32	383,801.94
Accounts Payable					
Commercial	23,025.27		19,976.44	450.61	43,452.32
P/R & Bus. Taxes	5,439.74	32,491.98		5,986.45	43,918.17
Income Taxes	308,266.81	14,992.69	27,773.18		351,032.68
Subcontractors	256,325.54	77,769.16			334,094.70
Notes Payable S & E	200,000.00				200,000.00
Reserves:					
Capital					
Special Partners	118,549.79		58,467.25	14,750.90	191,767.94
Deferred Income	13,123.51				13,123.51
Total External Liab. & Res.	1,045,025.43	350,525.25	122,873.30	42,767.28	1,561,191.26
Internal Accts. Pay.		61,929.65	487,250.48	403,522.86	952,702.99
Total Liab. and Reserves	1,045,025.43	412,454.90	610,123.78	446,290.14	2,513,894.25
Capital After 1952 Taxes					
Max J. Kuney & Trust	688,819.71				688,819.71
Max Kuney, Jr. & Trust	566,219.73				566,219.73
Lloyd W. Johnson & Trust		210,073.35			210,073.35
C. S. Greene			51,158.38		51,158.38
Total Net Worth	1,255,039.44	210,073.35	51,158.38		1,516,271.17
Total Liab., Res. and Net Worth	2,300,064.87	622,528.25	661,282.16	446,290.14	4,030,165.42

EXHIBIT 31

MAX J. KUNEY COMPANY**CONTRACTORS****EXECUTIVE OFFICE NORTH 120 RALPH
SPOKANE, WASHINGTON****MEMBER
ASSOCIATED GENERAL CONTRACTORS
OF AMERICA**

December 31, 1953

GENERAL STATEMENT

TRADE STYLE: Max J. Kuney Company is a partnership holding all the stock of Max J. Kuney Company, Inc., a Washington Corporation. The corporation has operating divisions for four types of construction work, which it operates with partners. For trade reasons these divisions are operated under different names as follows:

H	Max J. Kuney Company, Inc. 120 North Ralph St., Spokane	Heavy Construction Division
B	Kuney Johnson Company 1266 Mercer Street, Seattle	Building Division
E	Agutter Electric Company 5500 14th Ave. N. W., Seattle	Electrical Division
M	Tecler Aluminum Products 625 Yale Ave. No., Seattle	Manufacturing Division

HISTORY: Max J. Kuney, age 59, founded the business in 1930 to do highway and heavy construction work. Max J. Kuney, Jr., age 35, became a general partner in 1940 and they then started doing building and electrical work in a small way. In 1941 they started a separate Building Division, in 1944 they started a separate Electrical Division and in 1946 they started the Manufacturing Division. In 1953 they incorporated the Heavy Construction Division of which Max J. Kuney is President, Max Kuney, Jr., is Vice-President and W. B. Petersen is Secretary.

PARTNERS: S. O. Claggett, age 45, is a partner in the Heavy Construction Division, Lloyd W. Johnson, age 43, is a partner in the Building and Manufacturing Divisions and C. S. Greene, age 45, is a partner in the Electrical Division. All the partners are active and work full time in the business. Max Kuney, Jr. with partner S. O. Claggett manages the Heavy Construction Division in Spokane and Max J. Kuney with partners Johnson and Greene manages the three other divisions in Seattle.

RESOURCES: From earnings partially retained in the business the Kuneys' have \$1,371,188.29, and the other partners have \$294,529.36 invested in the business, totaling \$1,665,717.65 after provision for 1953 income taxes. None of the partners' personal assets held outside the business are included above. Liquid assets are 1.35 times Total Liabilities. Net Liquid Assets total \$804,384.32. Fixed Assets, except \$112,466.24 in notes, are all in equipment, land and buildings used directly in the business with a book value of \$748,867.09 after deduction of \$1,021,519.88 depreciation reserves.

PLANT AND EQUIPMENT: The Heavy Construction Division occupies a square block which the firm owns in Spokane. The property consists of office, shop, and storage buildings and a railroad spur with loading dock with all remaining area paved. The building and manufacturing divisions occupy three-quarters of the block bounded by Yale, Mercer, Pontius and Roy Streets which the firm owns in Seattle. The land area is 48,109 square feet. The present buildings occupy 37,587 square feet of ground area and contain 46,702 square feet of use area. The remaining 10,522 square feet of ground is paved parking and storage area. The Electrical Division occupies one-half block cornering on 14th Avenue and Market Street which the firm owns in Seattle. It contains a modern two-story office, shop and warehouse building plus fenced and paved open storage area. The firm owns 265 pieces of major equipment having an original cost of \$1,394,182.14, which it uses in its business of heavy grading and excavating, rock crushing, paving, general building, electrical contracting and light manufacturing.

EXHIBIT 31

MAX J. KUNEY COMPANY
CONSOLIDATED BALANCE SHEET AS OF
DECEMBER 31, 1953

ASSETS

Cash in Banks and in Transit to Banks—Schedule "A"		78,316.69
Contract Accounts Receivable, Current—Schedule "B"	620,455.22	
Contract Accounts Receivable, Retainage—Schedule "B"	<u>785,279.83</u>	1,405,735.05
Commercial Accounts Receivable—Schedule "C"		870,560.75
Unbilled Work Accounts Receivable—Schedule "D"		92,451.35
Inventories—Schedule "E"		668,383.68
Prepaid Items—Schedule "F"		<u>7,298.51</u>
Total Liquid Assets		3,122,746.03
Notes Receivable—Schedule "G"		112,466.24
Machinery and Equipment—Schedule "H"		
Purchase Price of Equipment Owned	1,394,182.14	
Less Depreciation Reserved	<u>987,530.12</u>	406,652.02
Land and Buildings Held for Business Use—Schedule "I"		
Purchase Price of Land and Buildings Owned	376,204.83	
Less Depreciation Reserved	<u>33,989.76</u>	<u>342,215.07</u>
Total Assets		<u>3,984,079.36</u>

LIABILITIES, RESERVES, CAPITAL AND SURPLUS

Bank Drafts Outstanding	335,319.74	
Accounts Payable, Commercial	112,296.06	
Accounts Payable, Payroll and Business Taxes	41,706.81	
Accounts Payable, 1953 Income Taxes	<u>114,367.64</u>	603,690.25
Accounts Payable, Subcontractors		405,308.68
Notes Payable, S & E Division, Seattle-1st National Bank		1,104,723.86
RESERVE: Capital of Special Partners		
W. R. Wiginton—Superintendent Heavy Const. Div.	107,220.43	
W. B. Petersen—Manager, Spokane Office	13,818.54	
W. H. Page—Manager, Manufacturing Division	<u>13,000.00</u>	134,038.97
RESERVE: Deferred Income		<u>70,599.95</u>
TOTAL LIABILITIES AND RESERVES		2,318,361.71
CAPITAL AND EARNED SURPLUS		
AFTER 1953 INCOME TAXES		<u>1,665,717.65</u>
TOTAL LIABILITIES, RESERVES,		
CAPITAL AND SURPLUS		<u>3,984,079.36</u>
CONTINGENT LIABILITIES		NONE

EXHIBIT 32

MAX J. KUNEY COMPANY
CONTRACTORS

EXECUTIVE OFFICE NORTH 120 RALPH
 SPOKANE, WASHINGTON

MEMBER
 ASSOCIATED GENERAL CONTRACTORS
 OF AMERICA

December 31, 1954

GENERAL STATEMENT

TRADE STYLE: Max J. Kuney Company is a partnership holding all the stock of Max J. Kuney Company, Inc., a Washington Corporation. The corporation has operating divisions for three types of construction work, which it operates with partners. For trade reasons these divisions are operated under different names as follows:

H	Max J. Kuney Company, Inc. 120 North Ralph St., Spokane	Heavy Construction Division
B	Kuney Johnson Company 1266 Mercer St., Seattle	Building Division
E	Agutter Electric Company 5500 14th Ave. N. W., Seattle	Electrical Division

HISTORY: Max J. Kuney, age 60, founded the business in 1930 to do highway and heavy construction work. Max Kuney, Jr., age 36, became a general partner in 1940 and they then started doing building and electrical work in a small way. In 1941 they started a separate Building Division, in 1944 they started a separate Electrical Division and in 1946 they started the Manufacturing Division, known as Tecler Aluminum Products, which operated as a subsidiary of the Building Division. In 1953 they incorporated the Heavy Construction Division of which Max J. Kuney is President, Max Kuney, Jr., is Vice-President and W. B. Petersen is Secretary.

In 1954 the Manufacturing Division, Tecler Aluminum Products, was completely liquidated at a loss of \$544,845.66 and in addition a

write-off of \$71,325.77 was taken on Agutter Electric Company assets, mainly obsolete inventory. The present statement reflects these losses totaling \$616,171.43 and tax refunds of \$177,733.48 now claimed by the partners on Federal Income Taxes paid, but it does not reflect interest on these tax funds or any future benefit because of the operating loss carry forward of \$79,864.88 which is applicable only to partner Lloyd W. Johnson. 1954 profits from remaining operations of the firm reduce its net worth decrease on the present statement, as compared with its statement of December 31, 1953, to \$221,248.58 after provision for 1954 Federal Income Taxes.

PARTNERS: S. O. Claggett, age 46, is a partner in the Heavy Construction Division, Lloyd W. Johnson, age 44, is a partner in the Building Division and C. S. Greene, age 46, is a partner in the Electrical Division. All the partners are active and work full time in the business. Max Kuney, Jr., with partner S. O. Claggett manages the Heavy Construction Division in Spokane and Max J. Kuney with partners Johnson and Greene manages the two other divisions in Seattle.

RESOURCES: From earnings partially retained in the business the Kuneys' have \$1,396,409.29, and the other partners have \$48,059.78 invested in the business, totaling \$1,444,469.07 after provision for the 1954 income taxes. None of the partners' personal assets held outside the business are included above. Liquid Assets are 2.32 times Current Liabilities. Net Liquid Assets total \$620,714.08. Fixed Assets, except \$164,822.80 due from Federal Income Tax refunds on amended returns of prior years awaiting audit, \$52,187.09 in notes and the \$187,317.00 book value of rental property in San Francisco held for investment are all in equipment, land and buildings used directly in the business with a book value of \$526,588.10 after deduction of \$1,080,319.11 depreciation reserves.

EXHIBIT 32

MAX J. KUNEY COMPANY
CONSOLIDATED BALANCE SHEET AS OF
DECEMBER 31, 1954

ASSETS

Cash in Banks and in Transit To Banks—Schedule "A"		310,807.79
Contract Accounts Receivable, Current—Schedule "B"	225,220.45	
Contract Accounts Receivable, Retainage—Schedule "B"	86,974.61	312,195.06
Commercial Accounts Receivable—Schedule "C"		302,183.55
Notes Receivable, Current Portion—Schedule "D"		104,384.28
Inventories—Schedule "E"		45,796.60
Current Income Tax Refunds Due—Schedule "F"		12,910.68
Prepaid Items—Schedule "G"		1,655.50
Total Liquid Assets		1,089,933.46
Income Tax Refund Claims Filed—Schedule "H"		164,822.80
Notes Receivable, Due after One Year—Schedule "D"		52,187.09
Machinery and Equipment—Schedule "I"		
Purchase Price of Equipment Owned	1,230,702.38	
Less Depreciation Reserved	1,028,622.00	202,080.38
Land and Buildings Held for Business Use—Schedule "J"		
Purchase Price of Land and Buildings Owned	376,204.83	
Less Depreciation Reserved	51,697.11	324,507.72
Land and Buildings Held for Investment—Schedule "K"		
Purchase Price—225 Shaw Road, San Francisco	192,500.00	
Less Depreciation Reserved	5,183.00	187,317.00
Total Assets		2,020,848.45

LIABILITIES, CAPITAL AND SURPLUS

Bank Drafts Outstanding	109,622.68	
Accounts Payable, Commercial	20,112.73	
Accounts Payable, Payroll and Business Taxes	23,878.43	153,613.84
Accounts Payable, Subcontractors		113,511.87
Provision for 1954 Income Taxes		
Due April, July and October 1955		92,152.19
Notes Payable (San Francisco Property), Current Portion		4,560.00
RESERVE: Capital of Special Partners		
W. R. Wiginton—Superintendent Heavy Const. Div.	91,340.29	
W. B. Petersen—Manager, Spokane Office	14,041.19	105,381.48
TOTAL CURRENT LIABILITIES		469,219.38
Notes Payable (Mortgage on Property at 225 Shaw Road, San Francisco)—Portion Due After One Year		107,160.00
Total Liabilities		576,379.38
CAPITAL AND EARNED SURPLUS		
AFTER PROVISION FOR INCOME TAX		1,444,469.07
TOTAL LIABILITIES, CAPITAL AND SURPLUS		2,020,848.45
CONTINGENT LIABILITIES		NONE

EXHIBIT 33

RENTAL AGREEMENT

This AGREEMENT, made and entered into this 14th day of May, 1953, by and between MAX J. KUNEY COMPANY, a partnership, hereinafter referred to as "Partnership", and MAX J. KUNEY COMPANY, a corporation, hereinafter referred to as "Corporation",

WITNESSETH:

Whereas the Partnership owns certain land, buildings, equipment and machinery and is willing to rent part or all of such property to the corporation, and

Whereas the corporation is engaged in the general contracting business and desires to rent from time to time certain of the property owned by the Partnership, and

Whereas the parties hereto desire to enter into an agreement in writing defining their respective rights and obligations with respect to the rental of said property,

Now, therefore, in consideration of the foregoing recitations, and the mutual promises and covenants of the parties hereto, it is agreed as follows:

(1) The terms of this agreement shall apply to all property, real and personal, which may be rented by the Partnership to the Corporation at any time from June 1, 1953 until otherwise terminated by the parties hereto.

(2) The rates of rental on machinery and equipment shall be a designated percentage, to be agreed upon between the parties, of the rates on similar machinery and equipment established by the current A.E.D. Manual. Where no rate is established in said manual as to a particular type of machinery or equipment, then the rental shall be as agreed upon between the parties. Rentals shall be charged only for the period in which the property is in actual use.

(3) The amount of rental to be charged for land and buildings shall be as agreed upon between the parties.

(4) All property, real and personal, covered by this agreement shall be upon a "bare rental basis", which is herein defined to mean that the corporation shall be responsible for the payment of all costs, repairs and other expenses of whatever kind or nature, including taxes, insurance, and assessments against said rental property during the

period in which the property is rented to the corporation under this agreement. All property shall be returned to the Partnership in the same condition as when received by the Corporation, ordinary wear and tear not excepted hereunder. The risk and liability for any injury or damage to said property from any source or cause whatever until the property is returned to the Partnership, shall be born by the Corporation, and the amount of such damages shall be paid to the Partnership by the Corporation upon demand.

(5) The real property covered by this agreement is represented to be in good condition, and, the personal property covered hereunder is represented to be in proper running order, but it is expressly understood that the Partnership is in no way responsible for the engineering in connection with its use or any other factor affecting the results to be accomplished by said property.

(6) In the event the Corporation fails to perform any of the terms of this agreement the Partnership may, at its option, cancel this agreement and immediately retake possession of the rented property, in which event the Corporation agrees to pay all costs in connection with the repossession of said property. If the Partnership decides to bring action of any kind to enforce any of the terms of this agreement, the Corporation agrees to pay in addition to the costs and disbursements provided by law, a reasonable attorney's fee, to be fixed by the court in which such action is brought.

(7) Time in the performance of each and every term and condition of this agreement are of the essence hereof. Nothing contained in this Rental Agreement shall be construed as an agreement of purchase.

(8) The terms of this agreement shall bind the heirs, administrators, assigns and successors in interest of each of the parties hereto.

IN WITNESS THEREOF, the parties have set their hands and seals the day above written.

MAX J. KUNEY COMPANY,

Partnership

By MAX KUNEY,

Partner

MAX J. KUNEY COMPANY,

Corporation

By MAX J. KUNEY,

President

EXHIBIT 34

CERTIFICATE OF TRUE NAME

KNOW ALL MEN BY THESE PRESENTS, That the undersigned, doing business at Spokane, in the County of Spokane, and State of Washington, under an assumed name and style, do hereby certify that the designation, name and style in which said business is to be conducted is: MAX J. KUNEY CO., and do further certify that the following persons are all of the persons conducting or intending to conduct said business or having an interest therein, and their true and real names, together with their respective post office addresses, are as follows:

<u>Name</u>	<u>Post Office Address</u>
Max J. Kuney	North 120 Ralph St.
Max Kuney, Jr.	Spokane 15, Washington

IN WITNESS WHEREOF, I have hereunto set my hand this 2nd day of July, A.D. 1945.

MAX J. KUNEY CO.
By W. B. PETERSEN
Office Manager

STATE OF WASHINGTON }
County of Spokane } ss.

I, NELS PAULSEN, Notary Public in and for the State of Washington, residing at Spokane, do hereby certify that on the 2nd day of July, 1945, personally appeared before me, W. B. Petersen, to me known to be the individual described in and who executed the within certificate of true name and acknowledged that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

GIVEN UNDER MY HAND and official seal this 2nd day of July, 1945.

NELS PAULSEN
Notary Public in and for the
State of Washington, residing at Spokane.

EXHIBIT 35

CERTIFICATE OF FIRM NAME

KNOW ALL MEN BY THESE PRESENTS, That the undersigned MAX J. KUNEY and MAX J. KUNEY, Jr., doing business at Spokane in the County of Spokane and State of Washington under an assumed name and style do hereby certify that the designation, name and style in which said business is to be conducted is MAX J. KUNEY COMPANY, that the following named persons are all of the persons conducting or intending to conduct said business or having an interest therein, and their true and real names, together with their respective post office addresses, are as follows, to-wit:

MAX J. KUNEY, 235 9th No., Seattle, Wash.

MAX J. KUNEY, Jr., North 120 Ralph St., Spokane, Wash.

IN WITNESS WHEREOF, we have hereunto set our hands this 27th day of March, A.D. 1953.

FILED APRIL 16, 1953

GEO. E. FALLQUIST, Clerk
SPOKANE COUNTY

MAX J. KUNEY

MAX J. KUNEY, Jr.

STATE OF WASHINGTON }
County of King } ss.

I, William J. McAllister, Notary Public in and for the State of Washington, residing at Seattle, do hereby certify that on this 27th day of March, 1953, personally appeared before me, Max J. Kuney and Max J. Kuney, Jr., to me known to be the individuals described in and who executed the within instrument and acknowledge that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes herein mentioned.

GIVEN UNDER MY HAND AND OFFICIAL SEAL this 27th day of March, 1953.

WILLIAM J. McALLISTER
Notary Public in and for the
State of Washington, residing
at Seattle.

EXHIBIT A

	2. Percentage of Time Devoted to Business	3. Ordinary Income (or loss) (line 33, page 1)
Max J. Kuney	All	\$14,686.19
Max Kuney, Jr.	All	14,686.19

EXHIBIT G

February 7, 1957

Effective Dates As Shown

PARTNERSHIP AGREEMENT: The Partners of Kuney Family Partnership agree that effective January 1, 1955, and until this agreement is changed in writing: (1) Active Partners Max J. Kuney and Max Kuney, Jr., shall receive total compensation \$10,000 per year from Partnership income to be divided equally between them and that the remaining income shall be distributed in proportion to each partner's Capital Investment in the Partnership. (2) Active Partners compensation each year shall be taken entirely from Partnership Capital Gains if such are sufficient, with the balance to be taken from Partnership Ordinary Income only when such is sufficient and Capital Gains are not sufficient.

MJK

Distribute Kuney Family Partnership Income FYE 12-31-55, according to CORPORATION MINUTES recorded JV 1, in proportion to Capital Interest recorded JV 3, and in accordance with PARTNERSHIP AGREEMENT recorded JV 4.

December 31, 1955:

	Ordinary Income	Capital Gains	Ledger Entry Debits Credits
DR 2931 Loss & Gain			
Kuney Partnership 1955	.00	18,672.50	18,672.50
Deduct for Active Partner's Services		<u>10,000.00</u>	
Distribute Remainder In Proportion to Capital January 1, 1955	<u>.00</u>	<u>8,672.50</u>	
CR 2861 Capital Max J. Kuney			
Capital Gains	16.99%	1,473.46	
Capital Gains Compensation		<u>5,000.00</u>	6,473.46
CR 2862 Capital Max Kuney, Jr.			
Capital Gains	16.99%	1,473.46	
Capital Gains Compensation		<u>5,000.00</u>	6,473.46
CR 2833 Capital Trust John R. Kuney			
Capital Gains	33.66%		2,919.16
CR 2834 Capital Trust Max J. Kuney III			
Capital Gains	16.18%		1,403.21
CR 2835 Capital Trust Caroline I. Kuney			
Capital Gains	16.18%		1,403.21

MJK

Compute Income Tax Payable 1955 Amended Returns:

TAXPAYER	Ordinary Income	Deductions Exemptions	Taxable Income	Capital Gains	Tax Total
Max J. Kuney	17,854.34	13,972.44	3,881.90	6,473.46	1,695.59
Max Jr. & Constance K. Kuney	17,890.47*	3,400.00	14,490.47	6,473.46	4,507.25
Trust: John R. Kuney	5,657.94	100.00	5,557.94	2,919.16	1,665.26
Trust: Max J. Kuney III	1,183.51	100.00	1,083.51	539.12	270.61
Trust: Caroline I. Kuney	1,183.51	100.00	1,083.51	539.12	270.61
C. H. and Mabel Bently (Deceased)	3,071.82	3,935.91	(864.09)	1,728.18	.00
Totals	<u>46,841.59</u>	<u>21,608.35</u>	<u>25,233.24</u>	<u>18,672.50</u>	<u>8,409.32</u>

*Includes \$36.13 Interest on Tax Refund

MJK

EXHIBIT Q

MINUTES OF SPECIAL MEETING OF
SHAREHOLDERS, DIRECTORS AND OFFICERS
OF MAX J. KUNEY COMPANY, INC.

March 20, 1956

On the above date, with all present and with Max J. Kuney presiding, W. R. (Tex) Wiginton was called into this meeting and this was done:

To quickly get to essential facts, I stated to all that the Corporation was owned by the Kuneys, that therefore whenever we said this or that was to be done it would mean it was done by unanimous approval of all shareholders, officers and directors of Max J. Kuney Company. The others said they understood this to be a fact.

I then requested them to imagine a condition widely different than this; with me owning 20%, my son 25%, Tex 40% and Petersen 15%, with the Kuneys out of control and residing permanently in some foreign land and they in control and managing but with the Kuneys still owning all Fixed Assets (Machinery & Equipment, Land & Buildings).

I said I was going to describe an arrangement I had worked out for the Corporation to pay rent to the Kuneys which would not only apply under those conditions, but under present conditions, as well, with the added requirement that the arrangement would be governed by the most thoroughly understood laws of the United States but that no lawyers or courts of law would ever be necessary to interpret them. Furthermore, settlement between Fixed Asset users and owners was to be accomplished annually between user and owner without any more accounting than would be required by law if user and owner was one and the same, and that finally this annual statement be so concise that the entire details would appear on one sheet of paper.

I requested all present to listen carefully and be prepared to take sides against me, and so they did listen.

I then stated that the laws were to be those governing the Federal Income Tax, that its Revenue Agents would take the place of lawyers and courts and I handed them an actual statement between all the

users and the owners that had not required any extra accounting and actually was on one sheet of paper.

The users had paid all ownership costs including interest on investment, and depreciation allowable or to be allowed on owner's Fixed Assets, and had computed this depreciation. The settlement stated this amount and added 30% to it as total net rent, and computed each owner's share of ownership in total Fixed Assets in use.

On inquiry of those present, I explained that the basis of rent was always a function of cost and time, so was depreciation and that therefore there was a precise relationship between the two, and that the 30% added was a simple but accurate determination of fair annual rental under average conditions.

With that understood it was stated that this rule would provide no rent profit on items which were in use after expiration of "ordinary useful life". It was then agreed there was a sound reason why this should be; namely, incentive to the user to carefully maintain equipment so he could get "free rent" after expiration of normal life, with corresponding benefit to owner's reduction in capital outlay. It was also stated that there could never be rent profit on owner's land but that in return the owner might have a "free ride" on capital gains because of appreciation in land values. All present stated they would consider the rule fair regardless of which side of the fence they were on.

It was understood the Corporation's real purpose from the beginning was that Wiginton and Petersen would own shares in the Corporation and that \$100,000.00 would buy a 20% interest.

It was agreed they would own shares for as long as they were employed, and that my son and I would take back their shares at their cost, plus 5% interest compounded annually, or at the book value of their shares if this amount was greater, whenever their employment was terminated.

I then stated that more or different shares would be issued to make total Corporation Capital \$500,000.00 and this was agreed. Nothing final was decided on actual amount of Wiginton's and Petersen's participation: Both stated they wanted to come in for all the money they could raise. It was agreed they could come in for \$100,000.00 total.

All decisions and agreements throughout this meeting were unanimous.

The purpose of this meeting being accomplished, it was ended by common consent.

MAX J. KUNEY
Chairman and President

Attest:
W. B. PETERSEN, Secretary

We, the undersigned, verify we were present together at the above meeting and that the above correctly states what occurred there:

MAX J. KUNEY

W. R. WIGINTON

MAX J. KUNEY, Jr.

W. B. PETERSEN

EXHIBIT Q

MINUTES OF THE ANNUAL MEETING OF THE SHAREHOLDERS OF MAX J. KUNEY COMPANY

Minutes of the annual meeting of the shareholders of Max J. Kuney Company held at the office of the company, North 120 Ralph Street, Spokane, Washington, on the 1st day of May, 1956 at the hour of 10 o'clock A. M. All of the outstanding capital stock of the company being represented in person and notice of the time, place and purpose of the meeting having been unanimously waived the meeting was declared in order for the transaction of business.

Mr. Max J. Kuney was chosen as chairman of the meeting and it was declared that there was a quorum present.

The chairman suggested that consideration must be given to proper arrangements for charges to the corporation for the use of partnership fixed assets as well as interest on other partnership funds used for the benefit of the corporation. In discussion it was pointed out that the examining revenue agent's report was not completed and it would be difficult to establish a lasting policy or make any changes at this time until the position of the treasury department can be determined. After discussion it was agreed that the general policy would be that the corporation should pay interest on capital

accounts of the Kuney Family Partnership and rent on fixed assets at a percentage of actual book depreciation but it was agreed that establishment of the exact rates and procedures would be postponed pending receipt of the examining revenue agent's report.

No motion was received to make any change in the Board of Directors as previously appointed in the annual meeting of May 1, 1954, and therefore said directors continue in office pursuant to the action of that meeting.

There being no further business to come before the meeting, it was, on motion, adjourned.

W. B. PETERSEN
Secretary

EXHIBIT Q

MINUTES OF SPECIAL MEETING OF SHAREHOLDERS, DIRECTORS AND OFFICERS OF MAX J. KUNEY COMPANY OF FEBRUARY 7, 1957

On the above day at Spokane, Washington a special meeting of the shareholders, directors and officers of the Max J. Kuney Company was held and there were present the following: Max J. Kuney, Max Kuney, Jr., W. R. Wiginton, W. B. Petersen.

All of the outstanding capital stock of the company being represented in person and notice of the time, place and purpose of the meeting having been unanimously waived the meeting was declared in order for the transaction of business. Mr. Max J. Kuney was chosen chairman of the meeting and discussion was had concerning the Internal Revenue Agent's examination in process. After discussion in detail and thereupon, on motion duly made, seconded and unanimously carried the following resolution was adopted: Resolved that all corporation shareholders accept (and the Kuney Family Partnership also accepts through partners Max J. Kuney and Max Kuney, Jr.'s agreement) the distribution of income fiscal year ending 1954 (corporate 4-30-55) as recorded in January 7, 1957 Taxpayer's Protest Schedule "C".

The next matter of discussion advanced by the chairman was the

desirability of creating another vice president of the corporation. Considerable discussion followed and thereupon, on motion duly made, seconded and unanimously carried, the following resolution was adopted: Resolved that W. R. Wiginton is hereby elected a vice president of the Max J. Kuney Company effective immediately.

The next matter of discussion advanced by the chairman was the desirability of equalizing compensation from the corporation between Max J. Kuney, Max Kuney, Jr. and W. R. Wiginton and establishing a new salary range for Secretary W. B. Petersen. After considerable discussion in detail and thereupon, on motion duly made, seconded and unanimously carried the following resolution was adopted: Resolved that effective January 1, 1955 corporate compensation of Max J. Kuney, Max Kuney, Jr. and W. R. Wiginton shall be equalized at \$15,000 per year each and effective January 1, 1957 corporate compensation of W. B. Petersen shall be set at \$12,000 per year, and it was further resolved that the directors shall be empowered to grant year end bonuses to the officers of this corporation with the amounts of such bonuses to be determined when final accounting for the year is completed and with the further provision that bonuses for officers are to be determined in reasonable amounts consistent with the duties and responsibilities of the persons involved.

The next item of discussion advanced by the chairman concerned the matter of payment of rental by the corporation to the Kuney Family Partnership for fiscal years 1955 and 1956 and interest on the partner's investment in those fixed assets. It was discussed that the examining Internal Revenue Agent had taken the position that the fixed assets in Seattle were, in effect, transferred to the corporation. It was discussed that this was not a tenable position and the corporation has protested accordingly, however, pending clarification it was discussed that rental charges on fixed assets for years 1955 and 1956 should best be held in abeyance until the treasury's position on this question was better known. Following this detailed discussion, on motion duly made, seconded and unanimously carried the following resolution was adopted: Resolved that for the time being the Kuney Family Partnership shall not charge the corporation rental for the use of its fixed assets fiscal years ending 1955 and 1956 but that following clarification of the Internal Revenue Department's position on the matter of the Seattle assets proper rental may be subsequently charged retroactively and, be it further resolved, that the

corporation shall pay interest on the partner's investment in fixed assets during the years in question at the interest rate the corporation paid the banks for borrowed money during those years.

The chairman next pointed out that the original corporate stock issued in a single certificate in the amount of \$400,000 to the Max J. Kuney Company Partnership was incorrectly issued and the stock should have been issued in two separate certificates in amount of 200,000 shares each, one to Max J. Kuney and one to Max Kuney, Jr. Upon discussion and motion duly made, seconded, and unanimously carried the following resolution was adopted: Resolved that the directors of the Max J. Kuney Company are hereby authorized to recall and cancel the original stock certificate issued to the Max J. Kuney Company Partnership and replace this certificate with two separate certificates in the amount of 200,000 shares each, one to Max J. Kuney and one to Max Kuney, Jr.

There being no further business, the meeting adjourned.

W. B. PETERSEN
Secretary

EXHIBIT Q

MINUTES OF A SPECIAL MEETING OF THE DIRECTORS OF MAX J. KUNEY COMPANY

Minutes of a special meeting of the directors of Max J. Kuney Company held at the office of the company, North 120 Ralph Street, Spokane, Washington, on the 6th day of February, 1958 at the hour of 10 o'clock A.M. All of the directors being present and notice of the time, place and purpose of the meeting having been unanimously waived the meeting was declared in order for the transaction of business.

Mr. Max J. Kuney pointed out to the directors that the Internal Revenue Agent's examination had been entirely completed and final conferences held with the appellate staff in Seattle and that all issues involving the corporation have finally been settled substantially the same as the original tax returns were filed. It was pointed out that for the years 1955 and 1956 the matter of rental charges to the cor-

poration on fixed assets owned by the Kuney Family Partnership and interest charges to the corporation on funds and investment in fixed assets owned by the Kuney Family Partnership has not been consistent as it should be. The Treasury Department has now approved in general the policy of the Kuney Family Partnership charging the corporation rent for the use of partnership fixed assets and has also recognized that interest on investments should be paid as has been the policy of the company for many years. Following discussion and in order to effect a consistent policy for all years on motion duly made, seconded, and unanimously carried, the following resolution was adopted: Resolved that in accordance with prior recommendations (see minutes of March 20, 1956) the corporation shall pay rent on fixed assets to the Kuney Family Partnership at a percentage of depreciation and that for the years 1955, 1956 and 1957 this percentage is to be set at 30% of depreciation and be it further resolved that interest on the capital accounts of the Kuney Family Partnership is to be paid by the corporation at the same rate as the corporation pays for bank financing and be it further resolved that a certified public accountant shall be engaged to amend all tax returns as required to reflect these changes in the years 1955 and 1956.

There being no further business, the meeting adjourned.

W. B. PETERSEN
Secretary

EXHIBIT R

MAX J. KUNEY COMPANY CONTRACTORS

EXECUTIVE OFFICE NORTH 120 RALPH
SPOKANE, WASHINGTON

MEMBER
ASSOCIATED GENERAL CONTRACTORS
OF AMERICA

December 31, 1955

GENERAL STATEMENT

TRADE STYLE: Max J. Kuney Company is a partnership holding all the stock of Max J. Kuney Company, Inc., a Washington Corporation. The corporation has operating divisions for three types of

construction work, which it operates with partners. For trade reasons these divisions are operated under different names as follows:

- | | | |
|---|--|-----------------------------|
| H | Max J. Kuney Company, Inc.
120 North Ralph St., Spokane | Heavy Construction Division |
| B | Kuney Johnson Company
1266 Mercer St., Seattle | Building Division |
| E | Agutter Electric Company
5500 14th Ave. N. W., Seattle | Electrical Division |

HISTORY: Max J. Kuney, age 61, founded the business in 1930 to do highway and heavy construction work. Max Kuney, Jr., aged 37, became a general partner in 1940 and they then started doing building and electrical work in a small way. In 1941 they started the Building Division and in 1944 they started the Electrical Division. In 1953 they incorporated the Heavy Construction Division of which Max J. Kuney is President, Max Kuney, Jr. and S. O. Claggett are Vice-Presidents and W. B. Petersen is Secretary-Treasurer.

In 1946 a Manufacturing Division known as Tecler Aluminum Products was started as a subsidiary of the Building Division. This operation was not successful and was completely liquidated in 1954 at a loss of \$544,845.66. This loss and concentration on collection of Tecler accounts has resulted in curtailment of construction contract volume in 1954 and 1955 to less than one-half average and normal volume.

PARTNERS: S. O. Claggett, age 47, is a partner in, as well as a non-salaried Vice President of, the Heavy Construction Division; Lloyd W. Johnson, age 45, is a partner in the Building Division and C. S. Greene, age 47, is a partner in the Electrical Division. All the partners are active and work full time in the business. Max Kuney, Jr., with partner S. O. Claggett manages the Heavy Construction Division in Spokane and Max J. Kuney with partners Johnson and Greene manages the two other divisions in Seattle.

RESOURCES: From earning partially retained in the business after paying Tecler losses of \$544,845.66 the Kuneys' now have \$1,315,495.63 and the other partners have \$15,126.25 invested in the business, totaling \$1,330,621.88 after provisions for 1955 income taxes. None of the partners' personal assets held outside the business

are included above. Liquid Assets are 1.56 times Current Liabilities. Net Liquid Assets total \$373,587.98. Fixed Assets include \$153,422.12 due from Federal Income Tax refunds on amended returns of prior years awaiting audit; \$123,957.51 in notes secured by deeds of trust on real property and the \$180,017.00 book value of rental property in San Francisco held for investment with the balance represented by equipment, land and buildings used directly in the business with a book value of \$499,637.27 after deduction of \$1,140,345.44 depreciation reserves.

APPENDIX C

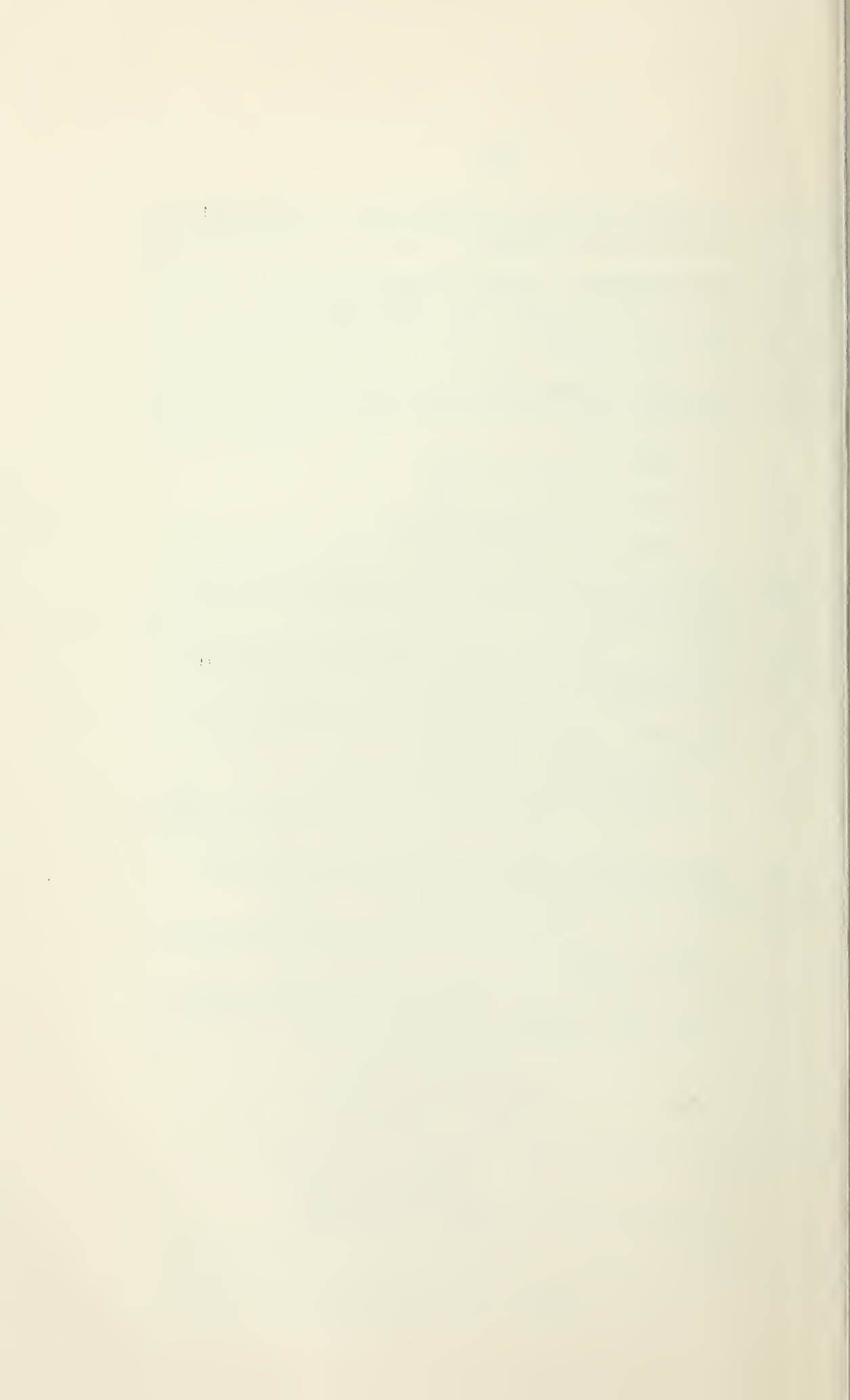
The following list of defendant's exhibits was mistakenly omitted from the pre-trial order printed in the record at pages 49-71. All the exhibits were introduced into evidence except Exhibit S, but are referred to only by description in the transcript of testimony reproduced in the printed record.

DEFENDANT'S EXHIBITS

Exhibit

- A. U. S. Partnership Returns of Income—
Max J. Kuney Company/Kuney Family Partnership, 1955 to 1959
- B. Fiduciary Income Tax Returns—
Years 1955-1958
Trust, Benefit of:
John R. Kuney
Max J. Kuney III
Caroline I. Kuney
- C. Individual Income Tax Returns—1955-1958
Max J. Kuney
Max (Jr.) and Constance Kuney
- D. Corporation Income Tax Returns, 1954-1959
- E. Journal Vouchers—1953

- F. Journal Vouchers—GLJV No. 1—May 31, 1953 — Partnership
- G. Bible—Max J. Kuney Company
- H. Journal Vouchers, No. JV 65, 67, 70 — Dec. 31, 1957
- I. Journal Vouchers GLJV 1146, 1147 — Feb. 5, 1957
- J. Journal Vouchers, 1958
- K. Journal Vouchers, 1959
- L. Drafts—Max J. Kuney Co. Bank Account
- M. General Ledger—Max J. Kuney Company Partnership
- N. General Ledger—Max J. Kuney Company (Corporation)—Manual
- O. General Ledger—Max J. Kuney Company (Corporation)—Machine
- P. Worksheet—Statement of Assets and Liabilities Transferred to Corporation June 1, 1953
- Q. Corporation Minutes and Stock Record—Max J. Kuney Company
- R. Financial Statement to Dun and Broadstreet May 1, 1956
- S. Financial Statement Eval., Dun & Bradstreet —Dec. 31, 1959



No. 17507-8-9

United States Court of Appeals For the Ninth Circuit

MAX KUNEY, JR. and CONSTANCE K. KUNEY, His Wife;
MAX J. KUNEY, SR., OLIVE R. KUNEY, *Appellants*,

vs.

WILLIAM E. FRANK, District Director of Internal
Revenue, *Appellee*.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON


REPLY BRIEF OF THE APPELLANTS

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INDEX*Page*

Terminology.....	1
Introduction.....	1
Correction of Government's Statement of Fact.....	2
Summary of Argument.....	13
Rebuttal of Government's Argument.....	15
Rebuttal to Point I.....	15
Rebuttal to Point II.....	18
Rebuttal to Point III.....	20
Rebuttal to Point IV.....	21
Rebuttal to Point V.....	25
Rebuttal to Point VI.....	25
Rebuttal to Point VII.....	26
Rebuttal to Point VIII.....	26
Conclusion	26

TABLE OF CASES

<i>Commissioner v. Culbertson</i> , 337 U.S. 733.....	15, 18
<i>Commissioner v. Tower</i> , 327 U.S. 280.....	15
<i>Lusthaus v. Commissioner</i> , 327 U.S. 293.....	15
<i>Peterson v. Gray</i> , 59-2 USTC ¶9692.....	16
<i>Stanback v. Commissioner</i> , 271 F.(2d) 514.....	16

STATUTES

Sec. 191, Internal Revenue Code of 1939.....	15
Sec. 677, Internal Revenue Code of 1954.....	26
Sec. 704(e), Internal Revenue Code of 1954.....	15, 18



United States Court of Appeals
For the Ninth Circuit

MAX KUNEY, JR. and CONSTANCE K. KUNEY, His Wife; MAX J. KUNEY, SR., OLIVE R. KUNEY,	<i>Appellants,</i>	No. 17507-8-9
vs.		
WILLIAM E. FRANK, District Director of Internal Revenue,	<i>Appellee.</i>	

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON

REPLY BRIEF OF THE APPELLANTS

TERMINOLOGY

In the record appellants Max J. Kuney SR. and his wife Olive are often referred to as Kuney SR. and Max J. Kuney JR. and his wife Constance are often referred to as Kuney JR. In its brief the appellee terms Kuney SR. and Kuney JR. “the tax payers.” In this brief this terminology will be followed and appellee will be termed “The Government.” The trial record is (R), the taxpayers brief is (TB), the Government’s brief is (GB) and the taxpayer’s reply brief is (TRB).

INTRODUCTION

The Government has not pointed to a single error or anything misleading in taxpayers STATEMENT. However, the Government has misused the testimony and exhibits in this case in an apparent effort to mislead this Court.

Whether or not such misuse is from carelessness or with deliberate intent to mislead, taxpayers consider it their duty to point to and correct such misuse. Taxpayers believe that some corrections are unimportant and some others are very important but realize it is their duty to direct all of the errors to the attention of this Court. Taxpayers will indicate the corrections considered of lesser importance by letters A and B, and will indicate those of greater importance by numbers 1 to 8, inclusive. Corrections below are stated in the sequence in which the errors appear in the Government's brief under STATEMENT (GB 4).

CORRECTION OF GOVERNMENT STATEMENT OF FACT

A. (GB7) The primary beneficiaries of the trusts were Caroline I. Kuney, age two; Max J. Kuney, age *nine*, and John R. Kuney, age *six* (corrections emphasized) (R100, 108, 265, 273).

1. (GB7 to 9) The terms of the trust instruments are misleadingly stated out of context. For Kuney Jr. trust read Article II (R359-362), and for Kuney Sr. trust read Article I (R371-374); *in context as written*.

2. (GB10) *Immediately* prior to the creation of the trusts on February 11, 1952 is misleading. The Kuney Family Partnership between Kuney Sr. and Kuney Jr. was formed in 1939 (R146) and is governed by partnership agreement executed and made effective January 1, 1940. "That was a very important agreement in my (Kuney Sr.) life, the most important." (R148).

3. (GB10) "but no change was made in the above partnership agreement. On February 11, 1952, effective

as of January 1, 1952, each grantor did execute an agreement with his trustee . . .” The words *but* and *did* are misleading as they appear above, and we believe deliberately so.

B. (GB10) “Subsequently, on February 7, 1957, effective as of January 1, 1955, a further agreement was made between the active partners, Kuney Sr. and Kuney Jr., that their respective salaries were to be paid so far as possible from partnership capital gains.” is correct. However, the *further agreement* “is simply (one of) a series of journal vouchers numbered one to a certain further place.” (R181).

4. (GB11) The statements made in the paragraph beginning “On February 11, 1952” are incorrect. The fact is: On January 1, 1940, the date of the formation of the Kuney Family Partnership, the understanding was the profits were to be divided between Kuney Sr. and Kuney Jr. equally, regardless of capital investment in the business by those partners. R146, 147, 148 correctly states the partnership agreement through the words “shall be equal” near the bottom of R147. Thereafter, from the word “PROVIDED” to the word “son” near the top of R148 the signed original of this agreement in tax payer’s files shows lines drawn through with bracket in margin and the words “deleted by mutual consent MJK-MK Jr. March 11, 1942.” The Agreement reads as follows:

1. THIS IS A PARTNERSHIP AGREEMENT entered into this first day of January, 1940 by and between Max J. Kuney, Father, and Max J. Kuney Junior, his son, hereinafter called the Father and the Son, and made for the purpose of operating all the busi-

ness of the firm MAX J. KUNEY COMPANY, hereinafter called the Firm, in all its branches in all the world.

2. The property of the firm is all that and only that now showing on the firms General Books of Account at Spokane, Washington and the investment of each partner is now and shall be that amount shown in each partners Capital Account.
3. The Father shall continue as the nominal head of the firm with final decision on all matters pertaining to the firm but it is contemplated that the Father will gradually retire from active management with decreasing duties and responsibility and that the Son will take over increasing duties and responsibility, but always with the Father continuing in full authority with final decision on all matters pertaining to the firm.
4. The Son shall give all his working time to the firms business, diligently pursue knowledge of the same in his spare time, and at all times actively Superintend and manage its affairs. It is contemplated that by the very nature of the firms business the responsibilities of the Son will be heavy and that his duties will involve a great amount of traveling with the hardships of a transient family life. This is fully understood between the parties hereto and the transfer of these duties and incident hardships from Father to Son is the very essence of this agreement.
5. It being considered that under the duties contemplated for each partner the Father will furnish experience beyond that of the Son while the Son will perform work beyond that of the Father, therefore, their respective salaries and shares in the firms profits shall be equal, ~~PROVIDED, however,~~

~~that before any profits are divided the Father shall receive interest at the rate of three (3%) per cent per annum on the amount his capital account exceeds the Son's Capital Account, except that this provision shall not operate until hereafter there shall have been the sum of \$50,000.00 profits first divided equally between Father and Son. [Deleted by mutual consent: MJK—MK Jr. March 11 1942].~~

6. The firms profits shall be determined annually at the close of each calendar year in accordance with principles of accounting consistently maintained by the firm, and shall be the identical amount accepted by the Income Tax Division of the U.S. Internal Revenue Service as being the Net Taxable Income of the firm for that year.
7. The partners shall have drawing accounts suitable to their respective stations in life with the determination of the amounts to be mutually agreed upon by the partners.

IN WITNESS WHEREOF, the parties have executed this agreement the day and date first above written.

Max J. Kuney

Max J. Kuney, Father

Max Kuney, Jr.

Max J. Kuney Jr., Son

“The 1957 agreement referred to . . .” *does not* make the same provision. It states what it states and means what it says. “The partners of Kuney Family Partnership (Kuney Sr., Kuney Jr., and three trust partners) agree that effective January 1, 1955, and until this agreement is changed in writing: (1) Active partners Max J. Kuney and Max Kuney Jr., shall receive total compensation \$10,000 per year from Partnership

Income to be divided equally between them and that the remaining income shall be distributed in proportion to *each* partners Capital Investment in the Partnership (Exhibit G GB88, *emphasis* supplied). Comparison of income distributions for year beginning 1-1-1954 with income distributions for year beginning 1-1-1955, as shown on Schedule A of Appendix following TB6A, will reveal dollar effect negligible, "change in method of allocating income between the grantors and the trusts" (GB26) *none*, and business purpose simplification of formulas A and B stipulated for years 1952, 1953 and 1954. (R70 and TB5).

The statement "An equal division of profits between father and son was the practice of the partnership previous to the creation of the trusts" is correct. The next words "despite this, however" might cause the reader to believe that the words to follow will reveal some wrong committed. But the statement "the father's and the son's capital accounts, both before and after the creation of the trusts, were not equal" is right but not wrong. The statement "the equal division of profits (between father and son) was 'not in accordance with the (their) capital investment at all' " is correct, is right, *and not wrong*.

5. (GB11) The next two sentences in the Government's brief are correct: "On June 1, 1953, the partnership operations were reorganized; only the fixed assets (land, buildings, machinery and equipment) were retained by the partnership. That portion of the business formerly carried on by the partnership which consisted of constructing and conduct of actual opera-

tions was withdrawn from the partnership and thereafter carried on by the Max J. Kuney Company, Inc.” (GB12).

The two sentences quoted above are *correct*. The next sentence is: “Kuney, Sr., testified that when the corporation was formed the trusts, as well as their grantors (Kuney, Sr., and Kuney, Jr.), were to receive an interest in the corporation (R165) through stock to be issued to the family partnership.” (GB12). In this sentence the Government misused the record to present a conflict. Kuney Sr. actually testified as follows:

THE COURT: Just tell us right to the point of who it was that was to own the stock in the corporation at that time.

THE WITNESS: The Kuney Family Partnership. (R165)

There is no conflict. The trusts entire investment in the Kuney Family Partnership was in “the fixed assets (land, buildings, machinery and equipment) retained by the partnership.” Obviously, the trusts could not and did not ever have any investment in the stock of the corporation nor “an interest in the corporation.” A stock certificate dated May 31, 1953 reading: “Max J. Kuney Company General Partnership . . . \$400,000.00” was written. This certificate was never recorded on the books of the corporation. In the eyes of the corporation it was never issued. Max J. Kuney Company General Partnership cancelled it (Exhibit Q4). It was incorrectly issued. (R166, 167, 168).

During the trial the Government settled the ownership of the corporation precisely, as follows: (Part page R241 through part page R243)

Question: All right. Now, our next question is about the formation of this corporation and who owned it, Mr. Bowen, so we can lay that at rest, and before I ask the question, I invite to your attention the language on Page 2 at the bottom,

“The Kuney Family Partnership capital was invested entirely in fixed assets consisting of equipment, machinery, land, and buildings, held out of the corporation in 1953 for the main reason: The corporation, with W. R. Wiginton and W. B. Peterson holding their agreed 20 per cent interest, would live on and be a reliable caretaker and user of such fixed assets after the adult Kuneys would die and would provide a steady and carefree income to their widows and the trusts for their children by paying them for the use of such fixed assets.” (Exhibit G).

Now, I invite your attention also to the next bookmark which I have placed in there, Mr. Bowen, which is, may we call it, a journal entry on journal voucher two, sir. Do you see it there, or could I help with it, June first, 1953? Journal voucher two?

These are accounting journal entries are they not?

Answer: (by Harold V. Bowen) Yes.

Question: And above the one I invited your attention to, we see typing across ‘MJK’ and below we see the same typing, ‘MJK.’ What does that mean?

Answer: That indicates the journal voucher was prepared by Max J. Kuney.

Question: Senior or Junior?

Answer: Presumably, Senior.

Question: Now, this journal voucher entry to an accountant on the basis of this journal entry, what does the debit to capital, Max J. Kuney, two hundred thousand dollars, debit to Max J. Kuney, Jr., two hundred thousand dollars, and credit to the account of 2801, capital stock, dated June 1, 1953, mean to you, Mr. Bowen, as an accountant?

Answer: It means that Account 2861 capital for Max J. Kuney, Jr., was charged with two hundred thousand dollars and the account 2801 was credited, which would be the corporation capital stock account, two hundred thousand dollars.

Question: And if you assumed with me for the moment, Mr. Bowen, that \$400,000 represents all of the capital stock of the corporation at that time, as an accountant from this journal entry, who were the owners of such capital stock?

Answer: Max Kuney and Max Kuney, Jr.

Question: How about the children, the trusts?

Answer: This doesn't indicate the children as owning any.

Question: And the date, again, is what?

Answer: This is dated June 1, 1953.

Question: All right. Now, let's look at the next date, December 31, 1956. Now we see a debit to Mr. Wiginton for \$80,000; to Mr. Petersen for \$20,000, and corresponding credits in the capital stock account.

Answer: Yes, that is correct.

Question: Now, as an accountant, from this journal entry when was the first time that Mr. Wiginton or Petersen became shareholders in this corporation?

Answer: December 31, 1956. (R243)

6. (GB12) The statement "No dividends were ever paid by the corporation . . .", is true. The testimony is:

"Question: Did the corporation stock pay any dividends?

Answer: No.

Question: Has it ever paid dividends?

Answer: No, it has not." (R221)

The Government says: "No dividends were ever paid by the corporation *to the partnership*" (R221) with emphasis supplied by its next statement which is not supported by the record and *is incorrect*.

The statement: "The effect of the formation of the partnership was to cause its total income to consist entirely of rental and interest payments made by the corporation to the partnership for the use of the partnership's fixed assets" is not supported by the record (R173, 186-187) and is incorrect. The fact is: In the year beginning January 1, 1954, when the formation of the corporation first affected the division of partnership income the partnership received \$55,571.02 income from "rental and interest payments made by the corporation to the partnership for the use of the partnership's fixed assets" and in addition received \$63,352.58 net long term capital gain (Stip 9, R54 and TB5), from sale of its fixed assets to others.

7. (GB12) The last sentence beginning "As a matter of fact" is misleading. It should read: The rental rates for the partnership assets used by the corporation during all years were determined at the time by the parties directly involved but were changed by In-

ternal Revenue Agent Francis A. Carney (R189, 190, 328-330) in 1956 (Exhibit G).

8. (GB12) The statement "Partnership assets were pledged as security on bank loans to the corporation" has no foundation in the record except in this and/or question propounded to banker Coon by the Government:

"Question: And you accordingly know that the partnership has pledged and/or made available to the corporation its fixed assets?"

Answer: That is right." (R208)

We submit that banker Coon should have answered the first part of this question "No" and the last part as he did. As proof we offer his entire testimony as it appears in the record (R204-213). We further submit that it reveals: The Kuney interests have never pledged any of its assets *to the bank in which he has been employed in Spokane for eleven years prior to 1960* (R204). The questions by the Government and the answers by Max J. Kuney Jr. are as follows (R295-296):

"Question: And you recall Mr. Coon testifying on the stand too, don't you, Mr. Kuney?"

Answer: Mr. Coon, yes.

Question: And about the bank loaning the money and that?

Answer: Yes.

Question: And if I asked him if it is true that the corporation ever pledged some of this property for the money that the corporation wanted to borrow at the bank? Do you remember a question such as that?

Answer: Yes.

Question: And his answer was yes?

Answer: That is right.

Question: And that is true, isn't it?

Answer: That is true.

Question: And who does that property belong to?

Answer: It belongs to the various partners.

Question: But who is borrowing the money, the corporation?

Answer: The corporation is signing the notes on the money.

Question: And at that time did the children have any interest at all in the corporation?

Answer: No, sir."

As a matter of fact the only property ever mortgaged or pledged was when the Max J. Kuney Company Corporation and Lloyd W. Johnson, doing business as Kuney Johnson Company *did mortgage* to the Bank of California at its main office at San Francisco its property at 225 Shaw Road South, San Francisco, as security for a loan made to Kuney Johnson Company in 1954. This loan and this mortgage shows on the December 31, 1954 Balance Sheet of Kuney Johnson Company (Exhibit 32, Sheet 15) and on the December 31, 1954 Financial Statement of Max J. Kuney Company (Exhibit 32, Sheet 5) as "Notes Payable (Mortgage on Property at 225 Shaw Road, San Francisco)—Portion Due After One Year "\$107,160.00." The same also shows on the portion of Exhibit 32 printed at GB83. This note and mortgage does not appear at any place on the next following December 31, 1955 Financial Statement of Max J. Kuney Company (Exhibit R). Sheet 5 of Exhibit R shows:

Land and Building Held for Investment—

Schedule “K”—225 Shaw Road, San Francisco—

Purchase Price	192,500.00
----------------	------------

Less Depreciation Reserved	12,483.00	180,017.00 ¹
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Amended 1956 U.S. Partnership Return of Income prepared and stamped by Cole, Bowen and Company for Kuney Family Partnership (Exhibit 38 B-1) shows: “Line 26, Net long-term capital gain (or loss) (from line 6, Schedule D).....\$32,014.43.” Line 6, Schedule D shows nothing. Line 3, Schedule D shows \$32,014.43. Mr. Bowen incorrectly listed Net long-term capital gain as Net short-term capital gain. However, the dates show “Assets held more than six months.” One of the Assets is Land and Building (California property) cost \$192,500, Depreciation \$13,091.33, Gross sales price \$215,000.00, Date sold 2-1-56, Expense of sale \$6,687.50, Gain \$28,903.83.

The Government’s final point stated at GB13 is argument and has no place in its statement. This point will be treated in its proper place below.

SUMMARY OF ARGUMENT

Max J. Kuney and Max J. Kuney Jr. were the partners of the Kuney Family Partnership from its commencement in 1940 until December 31, 1951. Each partner’s capital account represented his capital investment in the Kuney Family Partnership. Profits and losses were shared equally all in accordance with the partnership agreement. As of January 1, 1952, each

¹Note—Land and Building sold February 1, 1956 for \$215,000.00. \$195,000.00 installment note payable monthly at rate of \$1,300.00 commencing March 1, 1956. Secured by Deed of Trust.

partner made a bona fide gift of \$100,000 of this capital executing proper partnership and trust instruments and federal tax reports and made the proper entries in the accounting records of the Kuney Family Partnership. The adult Kuneys continued to manage the business affairs of the Kuney Family Partnership and each as trustee for the other managed the partnership interest held by him in trust for the minor Kuneys. The transfers of the ownership of the interests in the Kuney Family Partnership were real and bona fide and the donees became partners in the Kuney Family Partnership. The fact that the trusts did not perform any services, let alone "vital services" or contribute any "original capital" is not determinative. It was neither anticipated nor required that such be the case. Services performed by the managing partners were compensated by reasonable salaries. Controls retained by the adult Kuneys were only those required as managing partners and did not reach the maximum extent allowable under the law. The managing partners' handling of trust affairs has consistently been for the benefit of the trusts. The so-called heavy burden of proof allegedly required in these circumstances was met as evidenced by the jury's finding that the adult Kuneys as trustees were bona fide partners in the Kuney Family Partnership for Federal income tax purposes. Therefore, the sole question here is whether or not the adult Kuneys made bona fide gifts of a part of their partnership interests in the Kuney Family Partnership thereby making the donees partners in the Kuney Family Partnership for Federal income tax purposes.

REBUTTAL OF GOVERNMENT'S ARGUMENT

Rebuttal to Point I

The Government seeks to sustain its position in this case on the ground that the donors-adult Kuneys “* * * retained and exercised control over both the property purportedly transferred and the income earned therefrom, * * * ” since there was no “concrete evidence that the donee-trustee acted independently of the taxpayers or that the taxpayers no longer maintained dominion and control over the property and its income.”

The Government has erroneously relied on *Commissioner v. Culbertson*, 337 U.S. 733; *Commissioner v. Tower*, 327 U.S. 280, and *Lusthaus v. Commissioner*, 327 U.S. 293, in an effort to inject the theory “that where the services contributed by the donee partners are not ‘vital’ and ‘he has not participated in management and control of the business’ or contributed ‘original capital’ the taxpayer has a ‘heavy burden’ to prove the above ultimate fact.”

One need only read Section 191, of the Internal Revenue Code of 1939, as added by the Revenue Act of 1951 and the committee report thereon to conclude that the Government is endeavoring to interpret the law as it existed prior to that amendment.

Since that time a person or trust is to be recognized as a partner for income tax purposes “if he owns a capital interest in a partnership in which capital is a material income producing factor” irrespective of whether or not he purchased the interest (See Sec. 704 (e) IRC, 1954). This statute, and its predecessor Section 191,

preclude the previously common determination of the Government that a partnership was invalid because the family member paid nothing for his interest in the partnership or performed vital services. Stated simply, the validity of the partnership under the statute in such cases depends upon whether or not there had been an effective gift of the partnership interest.

In *Peterson, et al. v. Gray*, 59-2 USTC ¶9692, trusts were established for taxpayers' infant daughter who was then two years of age. The trustee, the Kentucky Trust Company, was made a limited partner. The court found that the compensation paid to taxpayer was reasonable for the periods involved. The net profits of the partnership were divided among the capital interests in proportion to their capital investments. The District Court rendered its decision in favor of taxpayer concluding:

“In view of the wording and history of the 1951 amendments, the court concludes that a family partnership must now be recognized for income tax purposes where the transfer of ownership to the family members was, as here, real and bona fide and not a mere pretense or sham.”

In *Stanback, et al. v. Commissioner*, CA 4, 271 F. 2d 514, the taxpayers, two brothers, had a proprietary medicine business which they conducted as partners. In 1937 and 1938 each transferred an undivided 6% interest in the partnership to each of three trusts he had created for the benefit of his wife and minor children. A valid limited partnership was at that time created. Each partner's participation in income was proportionate to his capital interest, nothing

being allocated to the general partners for their personal services. After reviewing the *Culbertson* decision, the court concluded: "Whether one may be said to be technically a partner, if he is the real owner of an undivided interest in a business, earnings properly attributable to that interest should be taxed to him. If he be the true owner of the interest, it matters not that the interest was given to him, as the Tax Court recognized in this case."

In discussing the 1951 amendments, the court stated: "It was not a codification of the *Culbertson* rule, as generally applied in the lower courts, for that rule was concerned with the recognition of partnership agreements, not with the taxation of investment income to the owner of the investment."

In discussing the requirement of contributions of original capital or of vital services the court stated:

"The business purpose requirement was satisfied, according to the new view, if a donee of an undivided interest in an existing partnership was the real owner of the interest, though the transaction was not intended to benefit the business of the partnership. Trustees as partners were to be recognized, and the case of a limited partner was not to be prejudiced because the general partners exercised the complete control contemplated by applicable state statutes."

In reviewing the Tax Court, the court stated:

"Capital interests in a partnership are not inalienable. They may be transferred by a parent to a child. The difficulty which family partnerships have encountered in obtaining tax recognition

arose out of their employment to transfer earnings from the personal services of active partners to their inactive dependents. The approach of *Mim.* 6767 provides a basis, subject to proper control through the exercise of the Commissioner's power to reallocate income, of recognition of the transferee as the owner of income produced by his capital while withholding recognition of him as the owner of income properly attributable to the personal services of others. Thus the taxation of the owner of a capital interest in a partnership is harmonized with that of an owner of a capital interest in a corporation, while the evil inherent in a ready acceptance of the partners' allocation of income is avoided."

The amendment by the Revenue Act of 1951 and its carryover to the 1954 Code as Section 704(e) therefore permits the creation of a family partnership by gift where capital is a material income producing factor, but requires that the partnership income be allocated in accordance with capital ownership and services performed. Since in this case, services were compensated and income thereafter divided in accordance with the law; the true owner of the interest in the Kuney family partnership is being taxed as contemplated under the law.

Rebuttal to Point II

The Government has attempted to attack the bona fides of the gifts by taxpayers on the ground that the only testimony introduced was that of the adult Kuneys which is purportedly self serving and therefore need not be believed. The statements of the taxpayer-trustees that they were fully aware of their responsi-

bilities as trustees and their conduct in administration of the trusts is certainly the best evidence of the bona fides of the gifts.

In addition the Government argues that in order to make a bona fide gift in trust a grantor *must* appoint a third party trustee who *must* be entirely independent of grantor and who *must* approach the administration of the trust income and property on an entirely third party basis, such as a banking institution. This theory is so contrary to well established trust law that further rebuttal argument is unnecessary.

The Government seeks to create the impression that the interests of the trusts in the Kuney Family Partnership were not fully disclosed to creditors and supports its position by asserting "Each of the statements omitted any reference at all to the trusts when describing the various partners (Exs. 30, 31, 32, GB Appendix B, *infra*)."

It seems incredible that the Government would seek to persuade this court of a fact which is plainly inaccurate. Not only does one of the printed pages of Ex. 30 (GB77) show "Max J. Kuney & Trust" and "Max Kuney, Jr. and Trust" but also page 15 of each exhibit shows the same and page 14 of each exhibit shows "Distribution of Net Income — Max J. Kuney and Minor Child" and "Max Kuney, Jr. and Minor Children" and Partner's Source of Profit and Net Worth After Withdrawals—"Max J. Kuney & Child" and Max Kuney, Jr. & Children." These financial statements also state that "any agency named herein is hereby authorized to supply any party to whom this statement is submitted with any informa-

tion necessary to verify it." This clearly shows that all interested parties could certainly ascertain the existence of the trusts. Furthermore, it should be noted that the only financial obligation, other than current accounts payable, was periodic loans from the Seattle-First National Bank only and at all times there were sufficient current assets to meet the current accounts payable. The lack of testimony by disinterested witnesses, such as other creditors as referred to by the Government, is the natural result of this situation where in fact no other creditors existed.

Rebuttal to Point III

The gifts of the partnership interests by the adult Kuneys made no change in the management or control of the partnership. However, the Government has failed to distinguish between the "management" of the business affairs of the Kuney Family Partnership by the "managing partners," the adult Kuneys, and the "ownership" of a part of the partnership capital by the trusts as administered by the adult Kuneys. Clearly, the trustee partners have the same rights of investment, withdrawal and reinvestment of capital owned by them in the Kuney Family Partnership as do the adult partners in the Kuney Family Partnership.

It has never been questioned that the adult Kuneys could withdraw their own capital from the Kuney Family Partnership, invest it elsewhere, or spend it for personal desires. The same rights existed as trust partners except that as a fiduciary none of the income or corpus of the trust could be expended for other than the purposes plainly outlined in the trust instruments.

At any time a trust partner desired to invest the trust property other than in the Kuney Family Partnership no obstacles existed. There were sufficient funds available at any time to permit this and neither a "heated discussion" nor any discussion between the managing partners would be required to accomplish this. There was never any reason to question the advisability of investing in the Kuney Family Partnership since this had, since its inception, been the practice of the trustees and had proven to be more profitable than any other investments available to the trustees.

This shows that the trustees had the same rights and duties as a third party trustee would have had with respect to the trust property and illustrates that the management and control of the business was affected in the same way by the appointment of the adult Kuneys as trustees as it would have been affected if a third party trustee had been appointed in their stead.

Rebuttal to Point IV

The exhibit as corrected and explained below in necessary particulars, shows that taxpayers neither retained or exercised control over the income earned by or distributed to the trusts.

The record shows that a blackboard exhibit was prepared by the Government the first day of the trial, and erased. A second blackboard exhibit was prepared in the court room by taxpayers' lawyer, Mr. Toole, and his accountant, Mr. Bowen, during the morning of the second day of the trial, while Mr. Toole's assistant, Mr. Harmon, was conducting the examination of witnesses Mr. Henry and Mr. Coon. As prepared, this exhibit appeared thus (R213):

chinery, equipment, land, and buildings) owned by that partnership on May 31, 1953, plus purchases, less sales to December 31, 1953. Such fixed assets were the total assets of the Kuney Family Partnership and they amounted to \$504,033.72. The capital of the adult Kuney, their trusts and their minor children was as follows:: :

SCHEDULE B. SUMMARY OF PARTNERS' CAPITAL ACCOUNTS AND INCOME DISTRIBUTION (PER CENT)
JANUARY 1, 1954 AND JANUARY 1, 1955

KUNEY PARTNERSHIP CAPITAL	JANUARY 1, 1954		JANUARY 1, 1955		JANUARY 1, 1955	
	AMOUNT	PER CENT	AMOUNT	PER CENT	AMOUNT	PER CENT
Max J. Kuney, Sr.	138,782.60	27.26	149,975.68	26.74		
Max J. Kuney, Jr.	138,782.60	27.82	149,975.69	26.74	299,951.37	53.48
Trust: John R. Kuney	115,786.00	22.74	133,958.46	23.90		
Trust: Max J. Kuney III	55,341.26	11.09	63,431.01	11.31		
Trust: Caroline I. Kuney	55,341.26	11.09	63,431.01	11.31	260,820.48	46.52
TOTAL KUNEY PARTNERSHIP CAPITAL	504,033.72		560,771.85		560,771.85	
Investment in Max J. Kuney Company Corporation by Max J. Kuney, Sr. and Max J. Kuney, Jr.						
Corporate Capital Stock	400,000.00		400,000.00		400,000.00	
Corporate Capital Surplus	290,199.86		334,059.64		334,059.64	
Transfers to Max J. Kuney Company Corporation by John R. Kuney, Max J. Kuney, III and Caroline I. Kuney	28,922.56		30,380.44		30,380.44	
Deferred Credits			180.00		180.00	
TOTALS REPORTED ON INCOME TAX RETURNS:						
For Year 1953, Exhibit 12	1,223,156.14					
For Year 1955, Exhibit 38A-1			1,325,391.93		1,325,391.93	

Based on these indisputable facts it is obvious that Court's Exhibit 2 must have been incorrect. A few of the major errors are: (1) The title "Investments in Business 1-1-55" indicates one business. (2) The date "1-1-55" should be 6-1-53, the date Max J. Kuney Company Corporation was born. (3) The Kuney children have never had any investment in "Surplus Capital," but had loans to Max J. Kuney Company Corporation. (4) The exhibit should have shown Kuney Partnership capital plus Kuney corporation capital Total \$1,295,000, instead of "Fixed Assets" plus "Surplus Capital" "Total \$1,325,000." (5) "Corporate Stock Withdrawal" was nothing instead of \$400,000. Court's Exhibit 2 correctly titled appears below:

COURTS EXHIBIT 2 CORRECTLY TITLED	KUNEY PARTNERSHIP				KUNEY CORPORATION		TOTAL
	CAPITAL AMOUNT	ADULTS %	CAPITAL AMOUNT	TRUSTS %	CAPITAL ADULTS	CAPITAL CHILDREN	
INVESTMENT IN BUSINESS 1-1-55	305,000	56%	250,000	44%			\$555,
INVESTMENT IN BUSINESS 1-1-55 CAPITAL STOCK CAPITAL SURPLUS					400,000 340,000		\$740,
LOANS TO KUNEY CORPORATION BY CHILDREN JOHN, MAX J. III AND CAROLINE I. KUNEY						30,000	30,
CORPORATE STOCK WITHDRAWAL	000	0	000	0	000	0	
INVESTMENT AFTER STOCK WITHDRAWAL	305,000	56%	250,000	44%	740,000	30,000	1,325,

Since Mr. Toole's questions and Mr. Bowen's answers were based on an incorrect exhibit, Mr. Bowen's testimony was incorrect. Naturally the trial judge became confused and rendered an erroneous decision.

In all cases here, partnership rental income depends on the business need of the corporation for partnership assets. No change in partnership income could be accomplished by the taxpayers unless unneeded assets were bought or needed assets were sold. To do this would be "foolhardy" (R284), and the record shows that this was never done.

Rebuttal to Point V

Taxpayers' control over the assets essential to the partnership business was absolute. The statement, "Partnership assets were even pledged as security on loans to the corporation in which the trusts had no interest whatever." (GB40), is incorrect. See Point 8, CORRECTION OF GOVERNMENT STATEMENT OF FACT, *supra*.

Rebuttal to Point VI

"The Kuney Family Partnership was formed by the two adult Kuneys to reduce their Income Taxes while living and to save inheritance taxes at their death." (Ex. G). As pointed out in TB5A " * * * where there is a real transfer of ownership, a gift of a family partnership interest is to be respected for tax purposes without regard to the motives which actuated the transfer, * * * ".

Rebuttal to Point VII

Incidents of ownership to the complete extent that would necessarily exist in a grantor-trustee partnership do not invalidate a family partnership trust for Federal Income Tax purposes under existing law. However, in the instant case taxpayers did not retain the substantial incidents of ownership, dominion and control to the extent that could be permissible under the law. The real control of the partnership remained with the adult Kuneys and the control of the trust property was granted to the trustees, all in accordance with the trust instruments.

Rebuttal to Point VIII

Section 677 (b) of the Internal Revenue Code of 1954, clearly spells out the circumstances under which income from a trust would be taxable to the grantor, namely that amount which is actually applied to support or maintain a beneficiary who the grantor is legally obligated to support or maintain. In the instant case there has been no application of any income which could make either grantor taxable under this Section.

CONCLUSION

For the reasons given above, the decision of the District Court is incorrect and should be reversed.

Respectfully submitted,

WARREN V. CLODFELTER

ALLEN A. BOWDEN

Attorneys for Appellants.

No. 17507-8-9

United States Court of Appeals
For the Ninth Circuit

MAX KUNEY, JR. and CONSTANCE K. KUNEY, His Wife;
MAX J. KUNEY, SR., OLIVE R. KUNEY, *Appellants*,

vs.

WILLIAM E. FRANK, District Director of Internal
Revenue, *Appellee*.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON

PETITION OF APPELLANTS FOR REHEARING

FILED

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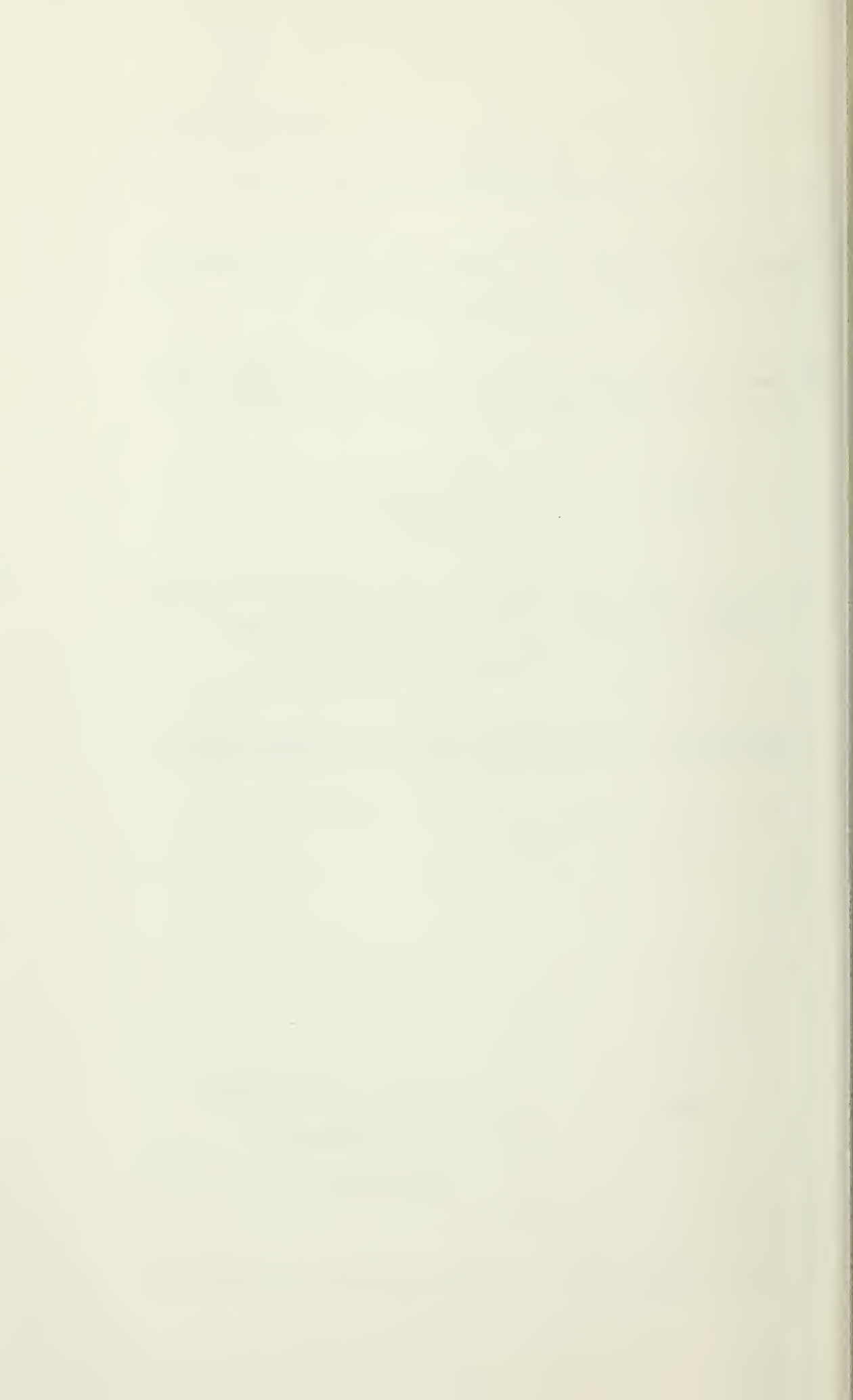
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United States Court of Appeals

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No. 17507-8-9

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON

PETITION OF APPELLANTS FOR REHEARING

Under the provisions of Rule 23 of this Court, the Appellants, Max Kuney, Jr. and Constance K. Kuney, his wife; Max J. Kuney, Sr., and Olive R. Kuney, through their counsel, respectfully petition for a rehearing *en banc* of the above causes (opinion filed in this Court on October 11, 1962) on the grounds set forth below:

Petitioners respectfully submit that this Court made the following errors:

I.

ERRORS IN STATEMENTS OF FACT

The Court misquoted the trust agreements by omission of the words emphasized below:

“Whenever any person under the age of thirty (30) years shall, under the provisions of this ar-

ticle, be entitled to receive or to have the use or application of any part of the net income of the Trust Estate, the Trustee may use and apply all or such part as to him shall seem best of such net income for or towards the maintenance, education, enjoyment, health and welfare of such person until *such person* attains the age of thirty (30) years, and the Trustee, during such time as *such person* is under the age of twenty-one (21) years, may either so use and apply the same himself or, in his discretion, pay the same or any part thereof to such person or to the guardian or parent or person having custody of such person *for the use and benefit of such person*, without any responsibility for the application thereof by such guardian, parent, or person having custody.” (R. 373, 374.)

The Court disregards the provision that income paid to the grantor must be applied solely for the benefit of the trust beneficiary and not otherwise and *not for the benefit of the grantor*.

The Court’s statement, “. . . changes in the surplus account necessarily changed the interests of the partners in the partnership” is incorrect. The fact is, changes in the surplus account, which at all times was in the corporation, had no effect whatever on the interest of the partners in the partnership nor, as the Court stated, “. . . in the share of income of each partner, including each trust.”

The Court stated that the Certified Public Accountant testified, “When he distributed income as directed by Kuney Senior, he did not distribute income in proportion to each partner’s capital investment in the partnership.” Petitioners can find no testimony to support

this statement. In fact, the record shows that Kuney Senior instructed and directed, in writing, that income be distributed in proportion to each partner's capital investment in the partnership and that he actually carried out the mathematical computations required to accomplish this. (Ex. G: JV 3, JV 4, JV 6, JV 7, JV 11).

There is no evidence to support the Court's statement that "the partnership assets were used for the credit of the corporation in its borrowings." Furthermore, the Court's statement is in error. (Reply Brief of the Appellants, pages 11-13.)

This Court stated "... no rent at all was paid on fully depreciated items ..." The undisputed and indisputable evidence is that the least rental ever paid on *any item* included all personal property taxes, maintenance and repair expenses and *all other costs of ownership*.

This Court further stated, "... this arrangement was questioned by an Internal Revenue Agent, ..." The evidence is that this arrangement was approved by the Appellate Staff of the Internal Revenue Service. (R. 281).

This Court states that "Kuney Senior testified that the beneficiaries of the trust were thus deprived of their interests in the corporation." There is no testimony that the trusts were ever deprived of anything in the sense of being dispossessed or bereaved. The testimony is: "... their money was invested elsewhere." (R.178). It should not be necessary to remind this Court that the question which Kuney Senior did not answer does not deserve an answer. (R. 172).

II.

ERRORS IN LEGAL CONCLUSIONS

In this case the jury found in favor of appellants and answered the crucial "good faith" special verdict question "Yes." The trial judge granted judgment *n.o.v.* This ruling can only be sustained if there was no substantial evidence to justify the verdict. Granting a judgment *n.o.v.* in this case after the special and general verdict invades the constitutional province of the jury.

In its concluding paragraph this Court states, "... the income is, as a matter of law, to be treated as ... the income of the donors." By this decision this Court has deprived the beneficiaries of all the income from property lawfully theirs. This result is unconscionable and violates the purpose of the statute.

Respectfully submitted,

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Attorneys for Petitioners

No. 17507-8-9

United States
Court of Appeals
for the Ninth Circuit

MAX KUNEY, JR., and CONSTANCE K.
KUNEY, His Wife; MAX J. KUNEY, SR.,
OLIVE R. KUNEY,

Appellants,

vs.

WILLIAM E. FRANK, DISTRICT DIRECTOR
OF INTERNAL REVENUE,

Appellee.

Transcript of Record

Appeals from the United States District Court for the
Western District of Washington,
Northern Division.

FILED

DEC 11 1961

No. 17507-8-9

United States
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KUNEY, His Wife; MAX J. KUNEY, SR.,
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

PAGE

Affidavit of Max J. Kuney in Opposition to Defendant's Motion for Summary Judgment..	45
Affidavit of Max J. Kuney, Jr., in Opposition to Defendant's Motion for Summary Judgment	47
Answer Cause No. 4990.....	29
Answer Cause No. 4991.....	35
Answer Cause No. 4992.....	40
Appeal:	
Bond for Costs on.....	90, 92, 93
Certificate of Clerk to Records on.....	381
Notice of	88, 89
Order Extending Time for Filing Record and Docketing on	95
Statement of Points to Be Relied Upon on..	385
Bond for Costs on Appeal Cause No. 4990....	90
Bond for Costs on Appeal Cause No. 4991....	92
Bond for Costs on Appeal Cause No. 4992....	93

INDEX	PAGE
Certificate of Clerk to Records on Appeal.....	381
Complaint Cause No. 4990.....	3
Complaint Cause No. 4991.....	13
Complaint Cause No. 4992.....	24
Counsel, Names and Addresses of.....	1
Defendant's Motion for Judgment Notwithstanding Verdict and in the Alternative for New Trial	44
Exhibits, Plaintiff's:	
No. 1—Trust Agreement	357
2—Trust Agreement	369
Judgment Notwithstanding Verdict of Jury..	86
Memorandum Decision	48
Motion for Directed Verdict.....	71
Motion for Summary Judgment, Defendant's.	78
Notice of Appeal Cause No. 4990.....	88
Notice of Appeal Cause No. 4991.....	88
Notice of Appeal Cause No. 4992.....	89
Order Extending Time for Filing Record and Docketing Appeal	95
Pre-Trial Order (Court's Exhibit No. 1).....	49
Renewal of Defendant's Motion for Directed Verdict	77

INDEX

PAGE

Statement of Points to Be Relief Upon by Appellants	385
Stipulation Re Exhibits	386
Order Re	387
Verdict	77
Transcript of Proceedings, November 21, 1960, etc.	97
Witness, Defendant's:	
Carney, Francis A.	
—direct	328
Witnesses, Plaintiffs':	
Bowen, Harold V.	
—direct	213
—cross	224
—redirect	252
—recross	257
Coon, Edward A.	
—direct	204
—cross	207
—redirect	209
—recross	211
Henry, James M.	
—direct	198
—cross	201

Witnesses, Plaintiffs'—(Continued):

Kuney, Max J., Jr.

—direct	262
—cross	289
—redirect	320, 326
—recross	321

Kuney, Max Jeffrey, Sr.

—direct	98
—cross	143
—redirect	186
—recross	193

Transcript of Proceedings, March 22, 1961....	353
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In the District Court of the United States in the
Western District of Washington, Northern
Division

No. 4990

MAX J. KUNEY, JR., and CONSTANCE K.
KUNEY, Husband and Wife,

Plaintiffs,

vs.

WILLIAM E. FRANK,

Defendant.

COMPLAINT

Plaintiffs for their first cause of action allege as follows:

I.

This action is brought under Title 28, United States Code, Section 1340, and under the Internal Revenue Laws of the United States, as hereunder more fully appears.

II.

The plaintiffs herein are and at all times material hereto were husband and wife, citizens of the United States, and over the age of twenty-one (21) years. At all times material hereto plaintiffs have resided in the City of Spokane, County of Spokane, State of Washington.

III.

The defendant herein is and at all times material hereto was the duly appointed and acting District Director of Internal Revenue for the District of Washington, and said defendant is now residing within the Western Judicial District of Washington.

IV.

Plaintiffs herein timely filed their Federal Income Tax Returns for the taxable years 1952, 1953 and 1954, with the defendant at Tacoma, Washington, and paid said defendant the following amounts of tax, shown as due on their returns as filed: 1952, \$133,988.06; 1953, \$26,840.04; 1954, \$19,557.12.

V.

That subsequent to the time that the plaintiffs filed their original Federal Income Tax Returns and on or about November 15, 1954, plaintiffs filed an amended Federal Income Tax Return for the taxable year 1952 with the defendant at Tacoma, Washington, and attached thereto a claim for refund of federal income tax for the taxable year 1952 in the amount of \$20,827.04, plus interest. A copy of the refund claim as filed is attached hereto, marked Exhibit "A," and made a part of this complaint by reference.

VI.

That thereafter the Commissioner of Internal Revenue, by and through his agents, conducted an audit investigation of the income tax returns as filed. On or about the 20th day of November, 1957, the Commissioner of Internal Revenue mailed a notice of deficiency (90 day letter) to the plaintiffs in which he determined that the said plaintiffs herein owed additional income tax for the taxable year 1952 in the amount of \$7,960.92, plus interest.

VII.

That the said additional tax, plus interest, was predicated upon the theory of the Commissioner of Internal Revenue that Max J. Kuney Company, a partnership between Max J. Kuney, Sr., Max J. Kuney, Jr., Max J. Kuney, Sr., as trustee for Max J. Kuney III and Caroline I. Kuney, minor children of plaintiffs Max J. Kuney, Jr., and Constance K. Kuney, and Max J. Kuney, Jr., as trustee for John R. Kuney, minor child of Max J. Kuney, Sr., and Olive R. Kuney, was invalid for federal income tax purposes, and that therefore the income of Max J. Kuney Company should be taxed only to Max J. Kuney, Sr., Olive R. Kuney, Max J. Kuney, Jr., and Constance K. Kuney.

VIII.

That in response to the determination of the Commissioner, as set out above, plaintiffs, on or about the 5th day of February, 1958, paid to the defendant at his Spokane, Washington, office, the sum of \$10,297.07 for the taxable year 1952, which sum included the additional tax asserted to be due, plus interest at the rate of 6 per cent (6%) per annum.

IX.

That on or about the 19th day of April, 1958, the plaintiffs filed with the defendant at Tacoma, Washington, a timely second claim for refund of federal income tax for the taxable year 1952 in the total amount of \$35,076.95, plus interest. The said claim was predicated principally upon the

ground that Max J. Kuney Company was a valid partnership for federal income tax purposes during the taxable year 1952. A copy of the second refund claim and riders thereto as filed is attached hereto, marked Exhibit "B," and made a part of the complaint by reference.

X.

That the plaintiffs' first claim for refund for the taxable year 1952, as set forth in paragraph V above, was disallowed by the Commissioner of Internal Revenue by registered mail under date of March 18, 1958.

XI.

That the plaintiffs' second claim for refund for the taxable year 1952, as set forth in paragraph IX above, was disallowed by the Commissioner of Internal Revenue by registered mail under date of September 15, 1958.

XII.

That Max J. Kuney Company was a valid partnership for federal income tax purposes during the taxable year 1952, consisting of Max J. Kuney, Sr., Max J. Kuney, Jr., Max J. Kuney, Sr. as trustee for Max J. Kuney III and Caroline I. Kuney, and Max J. Kuney, Jr., as trustee for John R. Kuney.

XIII.

That by reason of the payment of tax, as set forth in paragraphs IV and VIII above, and by reason of facts set forth herein and in the refund claims attached hereto, there is now due and owing

to the plaintiffs the sum of \$35,076.95, together with interest on the amount of \$24,779.88 at six per cent (6%) per annum from March 15, 1953, until paid, and interest on the amount of \$10,297.07 at six per cent (6%) per annum from February 5, 1958, until paid, said amount having been illegally and erroneously collected by the defendant from the plaintiffs for the taxable year 1952.

Plaintiffs for their second cause of action allege as follows:

XIV.

Plaintiffs reallege paragraphs I, II, III and IV of their first cause of action in haec verba.

XV.

That subsequent to the time that the plaintiffs filed their original Federal Income Tax Return and on or about November 15, 1954, plaintiffs filed an amended Federal Income Tax Return for the taxable year 1953 with the defendant at Tacoma, Washington, and attached thereto a claim for refund of federal income tax for the taxable year 1953 in the amount of \$2,012.70, plus interest. A copy of the refund claim as filed is attached hereto, marked Exhibit "C," and made a part of this complaint by reference.

XVI.

That thereafter the Commissioner of Internal Revenue, by and through his agents, conducted an audit investigation of the income tax returns as filed. On or about the 20th day of November, 1957,

the Commissioner of Internal Revenue mailed a notice of deficiency (90 day letter) to the plaintiffs in which he determined that there had been an overassessment of income tax for the taxable year 1953 in the amount of \$99.72, plus interest.

XVII.

That the failure of the Commissioner of Internal Revenue to determine a larger overassessment was predicated upon the theory that Max J. Kuney Company, a partnership between Max J. Kuney, Sr., Max J. Kuney, Jr., Max J. Kuney, Sr., as trustee for Max J. Kuney III and Caroline I. Kuney, minor children of plaintiffs Max J. Kuney, Jr., and Constance K. Kuney, and Max J. Kuney, Jr., as trustee for John R. Kuney, minor child of Max J. Kuney, Sr. and Olive R. Kuney, was invalid for federal income tax purposes, and that therefore the income of Max J. Kuney Company should be taxed only to Max J. Kuney, Sr., Max J. Kuney, Jr. and Constance K. Kuney.

XVIII.

That on or about the 19th day of April, 1958, the plaintiffs filed with the defendant at Tacoma, Washington, a timely second claim for refund of federal income taxes for the taxable year 1953 in the total amount of \$5,085.09, plus interest. The said claim was predicated principally upon the ground that Max J. Kuney Company was a valid partnership for federal income tax purposes during the taxable year 1953. A copy of the second

refund claim and riders thereto as filed is attached hereto, marked Exhibit "D," and made a part of the complaint by reference.

XIX.

That the plaintiffs' first claim for refund for the taxable year 1953, as set forth in paragraph XV above, was allowed in the amount of \$59.72, credited in the amount of \$40.00, and disallowed as to the remainder by the Commissioner of Internal Revenue by registered mail under date of March 18, 1958.

XX.

That the plaintiffs' second claim for refund for the taxable year 1953, as set forth in paragraph XVIII above, was disallowed by the Commissioner of Internal Revenue by registered mail under date of September 15, 1958.

XXI.

That Max J. Kuney Company was a valid partnership for federal income tax purposes during the taxable year 1953, consisting of Max J. Kuney, Sr., Max J. Kuney, Jr., Max J. Kuney, Sr., as trustee for Max J. Kuney III and Caroline I. Kuney, and Max J. Kuney, Jr., as trustee for John R. Kuney.

XXII.

That by reason of the payment of tax, as set forth in paragraph IV above, and by reason of the allowance of an overassessment in the amount of \$99.72, as set forth in paragraph XIX above, which overassessment has been refunded or credited to

plaintiffs, and by reason of facts set forth herein and the refund claims attached hereto, there is now due and owing to the plaintiffs the sum of \$5,085.09, together with interest thereon at the rate of 6 per cent (6%) per annum from March 15, 1954, until paid, said amount having been illegally and erroneously collected by the defendant from the plaintiffs for the taxable year 1953.

Plaintiffs as their third cause of action allege as follows:

XXIII.

Plaintiffs reallege paragraphs I, II, III and IV of their first cause of action in haec verba.

XXIV.

That subsequent to the time that the plaintiffs filed their Federal Income Tax Return for the taxable year 1954, as set out in paragraph IV above, the Commissioner of Internal Revenue, by and through his agents, conducted an audit investigation of the income tax return as filed. On or about the 20th day of November, 1957, the Commissioner of Internal Revenue mailed a notice of deficiency (90 day letter) to the plaintiffs in which he determined that the said plaintiffs herein owed additional income tax for the taxable year 1954 in the amount of \$7,689.71, plus interest.

XXV.

That the said additional tax, plus interest, was predicated upon the theory of the Commissioner of Internal Revenue that Max J. Kuney Company, a

partnership between Max J. Kuney, Sr., Max J. Kuney, Jr., Max J. Kuney, Sr., as trustee for Max J. Kuney III and Caroline I. Kuney, minor children of plaintiffs Max J. Kuney, Jr. and Constance K. Kuney, and Max J. Kuney, Jr., as trustee for John R. Kuney, minor child of Max J. Kuney, Sr. and Olive R. Kuney, was invalid for federal income tax purposes, and that therefore the income of Max J. Kuney Company should be taxed only to Max J. Kuney, Sr., Max J. Kuney, Jr. and Constance K. Kuney.

XXVI.

That in response to the determination of the Commissioner, as set out above, plaintiffs, on or about the 5th day of February, 1958, paid to the defendant at his Spokane, Washington, office, the sum of \$8,-272.78 for the taxable year 1954, which sum included the additional tax asserted to be due, plus interest at the rate of 6 per cent (6%) per annum.

XXVII.

That on or about the 19th day of April, 1958, the plaintiffs filed with the defendant at Tacoma, Washington, a timely claim for refund of federal income tax for the taxable year 1954 in the total amount of \$5,791.67, plus interest. The said claim was predicated principally upon the ground that Max J. Kuney Company was a valid partnership for federal income tax purposes during the taxable year 1954. A copy of the refund claim and riders thereto as filed is attached hereto, marked Exhibit "E," and made a part of the complaint by reference.

XXVIII.

That the plaintiffs' claim for refund for the taxable year 1954, as set forth in paragraph XXVII above, was disallowed by the Commissioner of Internal Revenue by registered mail under date of September 15, 1958.

XXIX.

That Max J. Kuney Company was a valid partnership for federal income tax purposes during the taxable year 1954, consisting of Max J. Kuney, Sr., Max J. Kuney, Jr., Max J. Kuney, Sr., as trustee for Max J. Kuney III and Caroline I. Kuney, and Max J. Kuney, Jr., as trustee for John R. Kuney.

XXX.

That by reason of the payment of taxes, as set forth in paragraphs IV and XXVI above, and by reason of the facts set forth herein and in the refund claims attached hereto, there is now due and owing to the plaintiffs the sum of \$5,791.67, together with interest thereon at the rate of 6 per cent (6%) per annum from February 5, 1958, until paid, said amount having been illegally and erroneously collected by the defendant from the plaintiffs for the taxable year 1954.

Wherefore, it is prayed that the Court hear this proceeding and render Judgment for the plaintiffs in the amount of \$35,076.95 for the taxable year 1952; \$5,085.09 for the taxable year 1953, and \$5,791.67 for the taxable year 1954, together with

interest at the rate of 6 per cent (6%) per annum as is provided by law.

WITHERSPOON, KELLEY,
DAVENPORT & TOOLE,

/s/ W. W. WITHERSPOON,

/s/ W. V. KELLEY,

/s/ ALLAN H. TOOLE.

[Endorsed]: Filed February 4, 1960.

In the District Court of the United States in the
Western District of Washington, Northern
Division

No. 4991

MAX J. KUNEY, SR.,

Plaintiffs,

vs.

WILLIAM E. FRANK,

Defendant.

COMPLAINT

Plaintiff for his first cause of action alleges as follows:

I.

This action is brought under Title 28, United States Code, Section 1340, and under the Internal Revenue Laws of the United States, as hereunder more fully appears.

II.

The plaintiff herein is and at all times material hereto was a citizen of the United States, and over the age of twenty-one (21) years. At all times material hereto plaintiff has resided in the City of Seattle, County of King, State of Washington.

III.

The defendant herein is and at all times material hereto was the duly appointed and acting District Director of Internal Revenue for the District of Washington, and said defendant is now residing within the Western Judicial District of Washington.

IV.

Plaintiff herein timely filed his Federal Income Tax Returns for the taxable years 1952, 1953 and 1954, with the District Director of Internal Revenue at Tacoma, Washington, and paid the following amounts of tax, shown as due on his returns as filed: 1952, \$104,119.17; 1953, \$22,605.64; 1954, \$11,510.76.

V.

That subsequent to the time that the plaintiff filed his original Federal Income Tax Returns and on or about November 15, 1954, plaintiff filed an amended Federal Income Tax Return for the taxable year 1952 with the defendant at Tacoma, Washington, and attached thereto a claim for refund of federal income tax for the taxable year 1952 in the amount of \$10,956.16, plus interest. A copy of the refund claim as filed is attached hereto, marked

Exhibit "A," and made a part of this complaint by reference.

VI.

That thereafter the Commissioner of Internal Revenue, by and through his agents, conducted an audit investigation of the income tax returns as filed. On or about the 20th day of November, 1957, the Commissioner of Internal Revenue mailed a notice of deficiency (90 day letter) to the plaintiff in which he determined that the said plaintiff herein owed additional income tax for the taxable year 1952 in the amount of \$1,087.24, plus interest.

VII.

That the said additional tax, plus interest, was predicated upon the theory of the Commissioner of Internal Revenue that Max J. Kuney Company, a partnership between Max J. Kuney, Sr., Max J. Kuney, Jr., Max J. Kuney, Sr., as trustee for Max J. Kuney III and Caroline I. Kuney, minor children of Max J. Kuney, Jr. and Constance K. Kuney, and Max J. Kuney, Jr., as trustee for John R. Kuney, minor child of Max J. Kuney, Sr., and Olive R. Kuney, was invalid for federal income tax purposes, and that therefore the income of Max J. Kuney Company should be taxed only to Max J. Kuney, Sr., Olive R. Kuney, Max J. Kuney, Jr., and Constance K. Kuney.

VIII.

That in response to the determination of the Commissioner, as set out above, plaintiff, on or about the 5th day of February, 1958, paid to the

District Director of Internal Revenue, Spokane, Washington, office, the sum of \$1,406.29 for the taxable year 1952, which sum included the additional tax asserted to be due, plus interest at the rate of 6 per cent (6%) per annum.

IX.

That on or about the 19th day of April, 1958, the plaintiff filed with the District Director of Internal Revenue at Tacoma, Washington, a timely second claim for refund of federal income tax for the taxable year 1952 in the total amount of \$13,662.39, plus interest. The said claim was predicated principally upon the ground that Max J. Kuney Company was a valid partnership for federal income tax purposes during the taxable year 1952. A copy of the second refund claim and riders thereto as filed is attached hereto, marked Exhibit "B," and made a part of the complaint by reference.

X.

That the plaintiff's first claim for refund for the taxable year 1952, as set forth in paragraph V above, was disallowed by the Commissioner of Internal Revenue by registered mail under date of March 18, 1958.

XI.

That the plaintiff's second claim for refund for the taxable year 1952, as set forth in paragraph IX above, was disallowed by the Commissioner of Internal Revenue by registered mail under date of September 15, 1958.

XII.

That Max J. Kuney Company was a valid partnership for federal income tax purposes during the taxable year 1952, consisting of Max J. Kuney, Sr., Max J. Kuney, Jr., Max J. Kuney, Sr., as trustee for Max J. Kuney III and Caroline I. Kuney, and Max J. Kuney, Jr., as trustee for John R. Kuney.

XIII.

That by reason of the payment of tax, as set forth in paragraphs IV and VIII above, and by reason of facts set forth herein and in the refund claims attached hereto, there is now due and owing to the plaintiff the sum of \$13,662.39, together with interest on the amount of \$12,256.10 at six per cent (6%) per annum from March 15, 1953, until paid, and interest on the amount of \$1,406.29 at six per cent (6%) per annum from February 5, 1958, until paid, said amount having been illegally and erroneously collected by the defendant from the plaintiff for the taxable year 1952.

Plaintiff for his second cause of action alleges as follows:

XIV.

Plaintiff realleges paragraphs I, II, III and IV of his first cause of action in haec verba.

XV.

That subsequent to the time that the plaintiff filed his original Federal Income Tax Return and on or about November 15, 1954, plaintiff filed an

amended Federal Income Tax Return for the taxable year 1953 with the defendant at Tacoma, Washington, and attached thereto a claim for refund of federal income tax for the taxable year 1953 in the amount of \$2,212.86, plus interest. A copy of the refund claim as filed is attached hereto, marked Exhibit "C," and made a part of this complaint by reference.

XVI.

That thereafter the Commissioner of Internal Revenue, by and through his agents, conducted an audit investigation of the income tax returns as filed. On or about the 20th day of November, 1957, the Commissioner of Internal Revenue mailed a notice of deficiency (90 day letter) to the plaintiff in which he determined that there had been an overassessment of income tax for the taxable year 1953 in the amount of \$1,427.23, plus interest.

XVII.

That the failure of the Commissioner of Internal Revenue to determine a larger overassessment was predicated upon the theory that Max J. Kuney Company, a partnership between Max J. Kuney, Sr., Max J. Kuney, Jr., Max J. Kuney, Sr., as trustee for Max J. Kuney III and Caroline I. Kuney, minor children of Max J. Kuney, Jr. and Constance K. Kuney, and Max J. Kuney, Jr., as trustee for John R. Kuney, minor child of Max J. Kuney, Sr. and Olive R. Kuney, was invalid

for federal income tax purposes, and that therefore the income of Max J. Kuney Company should be taxed only to Max J. Kuney, Sr., Max J. Kuney, Jr. and Constance K. Kuney.

XVIII.

That on or about the 19th day of April, 1958, the plaintiff filed with the defendant at Tacoma, Washington, a timely second claim for refund of federal income taxes for the taxable year 1953 in the total amount of \$4,149.57, plus interest. The said claim was predicated principally upon the ground that Max J. Kuney Company was a valid partnership for federal income tax purposes during the taxable year 1953. A copy of the second refund claim and riders thereto as filed is attached hereto, marked Exhibit "D," and made a part of the complaint by reference.

XIX.

That the plaintiff's first claim for refund for the taxable year 1953, as set forth in paragraph XV above, was allowed in the amount of \$1,427.23 and disallowed as to the remainder by the Commissioner of Internal Revenue by registered mail under date of March 18, 1958.

XX.

That the plaintiff's second claim for refund for the taxable year 1953, as set forth in paragraph XVIII above, was disallowed by the Commissioner

of Internal Revenue by registered mail under date of September 15, 1958.

XXI.

That Max J. Kuney Company was a valid partnership for federal income tax purposes during the taxable year 1953, consisting of Max J. Kuney, Sr., Max J. Kuney, Jr., Max J. Kuney, Sr., as trustee for Max J. Kuney III and Caroline I. Kuney, and Max J. Kuney, Jr., as trustee for John R. Kuney.

XXII.

That by reason of the payment of tax, as set forth in paragraph IV above, and by reason of the allowance of an overassessment in the amount of \$1,427.23, as set forth in paragraph XIX above, which overassessment has been refunded or credited to plaintiff, and by reason of facts set forth herein and the refund claims attached hereto, there is now due and owing to the plaintiff the sum of \$4,149.57, together with interest thereon at the rate of 6 per cent (6%) per annum from March 15, 1954, until paid, said amount having been illegally and erroneously collected by the defendant from the plaintiffs for the taxable year 1953.

Plaintiff as his third cause of action alleges as follows:

XXIII.

Plaintiff realleges paragraphs I, II, III and IV of his first cause of action in haec verba.

XXIV.

That subsequent to the time that the plaintiff filed his Federal Income Tax Return for the taxable year 1954, as set out in paragraph IV above, the Commissioner of Internal Revenue, by and through his agents, conducted an audit investigation of the income tax return as filed. On or about the 20th day of November, 1957, the Commissioner of Internal Revenue mailed a notice of deficiency (90 day letter) to the plaintiff in which he determined that the said plaintiff herein owed additional income tax for the taxable year 1954 in the amount of \$7,080.12, plus interest.

XXV.

That the said additional tax, plus interest, was predicated upon the theory of the Commissioner of Internal Revenue that Max J. Kuney Company, a partnership between Max J. Kuney, Sr., Max J. Kuney, Jr., Max J. Kuney, Sr., as trustee for Max J. Kuney III and Caroline I. Kuney, minor children of Max J. Kuney, Jr. and Constance K. Kuney, and Max J. Kuney, Jr., as trustee for John R. Kuney, minor child of Max J. Kuney, Sr. and Olive R. Kuney, was invalid for federal income tax purposes, and that therefore the income of Max J. Kuney Company should be taxed only to Max J. Kuney, Sr., Max J. Kuney, Jr. and Constance K. Kuney.

XXVI.

That in response to the determination of the Commissioner, as set out above, plaintiff, on or

about the 5th day of February, 1958, paid to the defendant at his Spokane, Washington, office, the sum of \$8,272.78 for the taxable year 1954, which sum included the additional tax asserted to be due, plus interest at the rate of 6 per cent (6%) per annum.

XXVII.

That on or about the 19th day of April, 1958, the plaintiff filed with the District Director of Internal Revenue at Tacoma, Washington, a timely claim for refund of federal income tax for the taxable year 1954 in the total amount of \$5,011.14, plus interest. The said claim was predicated principally upon the ground that Max J. Kuney Company was a valid partnership for federal income tax purposes during the taxable year 1954. A copy of the refund claim and riders thereto as filed is attached hereto, marked Exhibit "E," and made a part of the complaint by reference.

XXVIII.

That the plaintiff's claim for refund for the taxable year 1954, as set forth in paragraph XXVII above, was disallowed by the Commissioner of Internal Revenue by registered mail under date of September 15, 1958.

XXIX.

That Max J. Kuney Company was a valid partnership for federal income tax purposes during the taxable year 1954, consisting of Max J. Kuney, Sr., Max J. Kuney, Jr., Max J. Kuney, Sr., as trustee

for Max J. Kuney III and Caroline I. Kuney, and Max J. Kuney, Jr., as trustee for John R. Kuney.

XXX.

That by reason of the payment of taxes, as set forth in paragraphs IV and XXVI above, and by reason of the facts set forth herein and in the refund claims attached hereto, there is now due and owing to the plaintiff the sum of \$5,011.14, together with interest thereon at the rate of 6 per cent (6%) per annum from February 5, 1958, until paid, said amount having been illegally and erroneously collected by the defendant from the plaintiff for the taxable year 1954.

Wherefore, it is prayed that the Court hear this proceeding and render Judgment for the plaintiff in the amount of \$13,662.39 for the taxable year 1952, \$4,149.57 for the taxable year 1953 and \$5,011.14 for the taxable year 1954, together with interest at the rate of 6 per cent (6%) per annum as is provided by law.

WITHERSPOON, KELLEY,
DAVENPORT & TOOLE,

/s/ W. W. WITHERSPOON,

/s/ W. V. KELLEY,

/s/ ALLAN H. TOOLE.

[Endorsed]: Filed February 4, 1960.

In the District Court of the United States in the
Western District of Washington, Northern Division

No. 4992

OLIVE R. KUNEY,

Plaintiff,

vs.

WILLIAM E. FRANK,

Defendant.

COMPLAINT

Plaintiff for her first cause of action alleges as follows:

I.

This action is brought under Title 28, United States Code, Section 1340, and under the Internal Revenue Laws of the United States, as hereunder more fully appears.

II.

The plaintiff herein is and at all times material hereto was a citizen of the United States, and over the age of twenty-one (21) years. At all times material hereto plaintiff has resided in the City of Seattle, County of King, State of Washington.

III.

The defendant herein is and at all times material hereto was the duly appointed and acting District Director of Internal Revenue for the District of Washington, and said defendant is now residing within the Western Judicial District of Washington.

IV.

Plaintiff timely filed her Federal Income Tax Return for the taxable year 1952 with the defendant at Tacoma, Washington, and paid said defendant the following amount of tax, shown as due on her return as filed: \$70,104.10.

V.

That subsequent to the time that the plaintiff filed her original Federal Income Tax Return and on or about November 15, 1954, plaintiff filed an amended Federal Income Tax Return for the taxable year 1952 with the defendant at Tacoma, Washington, and attached thereto a claim for refund of federal income tax for the taxable year 1952 in the amount of \$10,981.33, plus interest. A copy of the refund claim as filed is attached hereto, marked Exhibit "A," and made a part of this complaint by reference.

VI.

That thereafter, and on or about February 8, 1956, plaintiff filed with the defendant at Tacoma, Washington, a second timely claim for refund of federal income tax for the taxable year 1952 in the amount of \$70,104.10, plus interest. A copy of this refund claim as filed is attached hereto, marked Exhibit "B," and made a part of this complaint by reference.

VII.

That thereafter the Commissioner of Internal Revenue, by and through his agents, conducted an

audit investigation of the income tax returns as filed. On or about the 20th day of November, 1957, the Commissioner of Internal Revenue mailed a notice of deficiency (90 day letter) to the plaintiff in which he determined that the said plaintiff herein owed additional income tax for the taxable year 1952 in the amount of \$1,615.22, plus interest.

VIII.

That the said additional tax, plus interest, was predicated upon the theory of the Commissioner of Internal Revenue that Max J. Kuney Company, a partnership between Max J. Kuney, Sr., Max J. Kuney, Jr., Max J. Kuney, Sr., as trustee for Max J. Kuney III and Caroline I. Kuney, minor children of Max J. Kuney, Jr. and Constance K. Kuney, and Max J. Kuney, Jr., as trustee for John R. Kuney, minor child of Max J. Kuney, Sr. and Olive R. Kuney, was invalid for federal income tax purposes, and that therefore the income of Max J. Kuney Company should be taxed only to Max J. Kuney, Sr., Olive R. Kuney, Max J. Kuney, Jr., and Constance K. Kuney.

IX.

That in response to the determination of the Commissioner, as set out above, plaintiff, on or about the 5th day of February, 1958, paid to the defendant at his Spokane, Washington, office, the sum of \$2,089.21 for the taxable year 1952, which sum included the additional tax asserted to be due, plus interest at the rate of 6 per cent (6%) per annum.

X.

That on or about the 19th day of April, 1958, the plaintiff filed with the defendant at Tacoma, Washington, a timely third claim for refund of federal income tax for the taxable year 1952 in the total amount of \$14,289.47, plus interest. The said claim was predicated principally but not wholly upon the ground that Max J. Kuney Company was a valid partnership for federal income tax purposes during the taxable year 1952. A copy of the third refund claim and riders thereto as filed is attached hereto, marked Exhibit "C," and made a part of the complaint by reference.

XI.

That on or about the 9th day of February, 1959, the plaintiff filed with the defendant at Tacoma, Washington, a timely fourth claim for refund of federal income tax for the taxable year 1952 in the total amount of \$20,894.89, plus interest. This claim was predicated on the dual grounds that Max J. Kuney Company was a valid partnership for federal income tax purposes during the taxable year 1952 and that plaintiff was entitled to an additional deduction in the amount of \$9,071.62 for fees paid to her attorney in a successful effort to obtain additional alimony from her husband for the years 1953-1957. A copy of the fourth refund claim and riders thereto as filed is attached hereto, marked Exhibit "D," and made a part of the complaint by reference.

XII.

That the plaintiff's first and second claims for refund for the taxable year 1952, as set forth in paragraphs IV and V above, were disallowed by the Commissioner of Internal Revenue by registered mail under date of March 18, 1958.

XIII.

That the plaintiff's third claim for refund for the taxable year 1952, as set forth in paragraph IX above, was disallowed by the Commissioner of Internal Revenue by registered mail under date of September 15, 1958.

XIV.

That the plaintiff's fourth claim for refund for the taxable year 1952, as set forth in paragraph XI above, was allowed in the amount of \$2,089.21 plus interest from February 5, 1958, and refund of such amount was made on or about December 1, 1959.

XV.

That Max J. Kuney Company was a valid partnership for federal income tax purposes during the taxable year 1952, consisting of Max J. Kuney, Sr., Max J. Kuney, Jr., Max J. Kuney, Sr., as trustee for Max J. Kuney III and Caroline I. Kuney, and Max J. Kuney, Jr., as trustee for John R. Kuney.

XVI.

That by reason of the payment of tax, as set forth in paragraph IV above, and by reason of

facts set forth herein and in the refund claims attached hereto, there is now due and owing to the plaintiff the sum of \$14,289.47, together with interest at six per cent (6%) per annum from March 15, 1953, until paid, said amount having been illegally and erroneously collected by the defendant from the plaintiff for the taxable year 1952.

Wherefore, it is prayed that the Court hear this proceeding and render Judgment for the plaintiff in the amount of \$20,894.89 for the taxable year 1952, together with interest at the rate of 6 per cent (6%) per annum as is provided by law.

WITHERSPOON, KELLEY,
DAVENPORT & TOOLE,

/s/ W. W. WITHERSPOON,

/s/ W. V. KELLEY,

/s/ ALLAN H. TOOLE.

[Endorsed]: Filed February 4, 1960.

[Title of District Court and Cause.]

Civil No. 4990

ANSWER

First Cause of Action

Defendant, William E. Frank, by his attorney in answer to the Complaint states:

1.

Admits the allegations contained in paragraph numbered I thereof.

2.

Admits the allegations contained in paragraph numbered II thereof.

3.

Admits the allegations contained in paragraph numbered III thereof.

4.

Admits the allegations contained in paragraph numbered IV thereof.

5.

Admits the allegations contained in paragraph numbered V thereof, except denies each and every allegation of fact set forth in the amended tax return and in the claim for refund.

6.

Admits the allegations contained in paragraph numbered VI thereof.

7.

Denies the allegations contained in paragraph numbered VII thereof, except admits that the Commissioner of Internal Revenue assessed additional taxes on the grounds that Max J. Kuney, Sr., as Trustee, and Max J. Kuney, Jr., as Trustee, are not properly recognized for tax purposes as partners in Max J. Kuney Company, a partnership.

8.

Admits the allegations contained in paragraph numbered VIII thereof.

9.

Admits the allegations contained in paragraph numbered IX thereof, except denies each and every allegation of fact set forth in the claim for refund.

10.

Admits the allegations contained in paragraph numbered X thereof.

11.

Admits the allegations contained in paragraph numbered XI thereof.

12.

Denies the allegations contained in paragraph numbered XII thereof.

13.

Denies the allegations contained in paragraph numbered XIII thereof.

Second Cause of Action

14.

Realleges the answers made in Count One in paragraphs numbered 1, 2, 3, and 4, herein.

15.

Admits the allegations contained in paragraph numbered XV thereof, except denies each and every allegation of fact set forth in the claim for refund.

16.

Admits the allegations contained in paragraph numbered XVI thereof.

17.

Denies the allegations contained in paragraph numbered XVII thereof, except admits that the Commissioner of Internal Revenue assessed additional taxes on the grounds that Max J. Kuney, Sr., as Trustee, and Max J. Kuney, Jr., as Trustee, are not properly recognized for tax purposes as partners in Max J. Kuney Company, a partnership.

18.

Admits the allegations contained in paragraph numbered XVIII thereof, except denies each and every allegation of fact set forth in the claim for refund.

19.

Admits the allegations contained in paragraph numbered XIX thereof.

20.

Admits the allegations contained in paragraph numbered XX thereof.

21.

Denies the allegations contained in paragraph numbered XXI thereof.

22.

Denies the allegations contained in paragraph numbered XXII thereof.

Third Cause of Action

23.

Realleges the answers made in Count One in paragraphs numbered 1, 2, 3, and 4, herein.

24.

Admits the allegations contained in paragraph numbered XXIV thereof.

25.

Denies the allegations contained in paragraph numbered XXV thereof, except admits that the Commissioner of Internal Revenue assessed additional taxes on the grounds that Max J. Kuney, Sr., as Trustee, and Max J. Kuney, Jr., as Trustee, are not properly recognized for tax purposes as partners in Max J. Kuney Company, a partnership.

26.

Admits the allegations contained in paragraph numbered XXVI thereof.

27.

Admits the allegations contained in paragraph numbered XXVII thereof, except denies each and every allegation of fact set forth in the claim for refund.

28.

Admits the allegations contained in paragraph numbered XXVIII thereof.

29.

Denies the allegations contained in paragraph numbered XXIX thereof.

30.

Denies the allegations contained in paragraph numbered XXX thereof.

Alternative Defense

Defendant alleges that in the event the Court should find for plaintiff that Max J. Kuney, Sr., as Trustee, and Max J. Kuney, Jr., as Trustee, were bona fide partners in Max J. Kuney Company for federal income tax purposes, plaintiff is nevertheless not entitled to a refund of the entire amount claimed, since there has been an improper allocation of partnership income among the partners as claimed in the partnership returns for the years involved. A determination for the taxpayer on the issue raised by the complaint will require a reallocation of the income to the partners giving to each the share to which he is entitled, taking into consideration the earnings due to his labor and/or his capital contribution to the partnership. It is further alleged that plaintiffs are required to prove that their taxes have been overpaid and the exact amount of such overpayment before they are entitled to any recovery of said tax.

Wherefore, defendant prays that the Complaint be dismissed with prejudice and the cost be assessed against the plaintiff.

/s/ CHARLES P. MORIARTY,
United States Attorney,
Attorney for Defendant.

Duly verified.

[Endorsed]: Filed April 4, 1960.

[Title of District Court and Cause.]

Civil No. 4991

ANSWER

First Cause of Action

Defendant, William E. Frank, by his attorney in answer to the Complaint states:

1.

Admits the allegations contained in paragraph numbered I thereof.

2.

Admits the allegations contained in paragraph numbered II thereof.

3.

Admits the allegations contained in paragraph numbered III thereof.

4.

Admits the allegations contained in paragraph numbered IV thereof.

5.

Admits the allegations contained in paragraph numbered V thereof, except denies each and every allegation of fact set forth in the amended tax return and in the claim for refund.

6.

Admits the allegations contained in paragraph numbered VI thereof.

7.

Denies the allegations contained in paragraph numbered VII thereof, except admits that the Commissioner of Internal Revenue assessed additional taxes on the grounds that Max J. Kuney, Sr., as Trustee, and Max J. Kuney, Jr., as Trustee, are not properly recognized for tax purposes as partners in Max J. Kuney Company, a partnership.

8.

Admits the allegations contained in paragraph numbered VIII thereof.

9.

Admits the allegations contained in paragraph numbered IX thereof, except denies each and every allegation of fact set forth in the claim for refund.

10.

Admits the allegations contained in paragraph numbered X thereof.

11.

Admits the allegations contained in paragraph numbered XI thereof.

12.

Denies the allegations contained in paragraph numbered XII thereof.

13.

Denies the allegations contained in paragraph numbered XIII thereof.

Second Cause of Action

14.

Realleges the answers made in Count One in paragraphs numbered 1, 2, 3, and 4, herein.

15.

Admits the allegations contained in paragraph numbered XV thereof, except denies each and every allegation of fact set forth in the claim for refund.

16.

Admits the allegations contained in paragraph numbered XVI thereof.

17.

Denies the allegations contained in paragraph numbered XVII thereof, except admits that the Commissioner of Internal Revenue assessed additional taxes on the grounds that Max J. Kuney, Sr., as Trustee, and Max J. Kuney, Jr., as Trustee, are not properly recognized for tax purposes as partners in Max J. Kuney Company, a partnership.

18.

Admits the allegations contained in paragraph numbered XVIII thereof, except denies each and every allegation of fact set forth in the claim for refund.

19.

Admits the allegations contained in paragraph numbered XIX thereof.

20.

Admits the allegations contained in paragraph numbered XX thereof.

21.

Denies the allegations contained in paragraph numbered XXI thereof.

22.

Denies the allegations contained in paragraph numbered XXII thereof.

Third Cause of Action

23.

Realleges the answers made in Count One in paragraphs numbered 1, 2, 3, and 4, herein.

24.

Admits the allegations contained in paragraph numbered XXIV thereof.

25.

Denies the allegations contained in paragraph numbered XXV thereof, except admits that the Commissioner of Internal Revenue assessed additional taxes on the grounds that Max J. Kuney, Sr., as Trustee, and Max J. Kuney, Jr., as Trustee, are not properly recognized for tax purposes as partners in Max J. Kuney Company, a partnership.

26.

Admits the allegations contained in paragraph numbered XXVI thereof.

27.

Admits the allegations contained in paragraph numbered XXVII thereof, except denies each and every allegation of fact set forth in the claim for refund.

28.

Admits the allegations contained in paragraph numbered XXVIII thereof.

29.

Denies the allegations contained in paragraph numbered XXIX thereof.

30.

Denies the allegations contained in paragraph numbered XXX thereof.

Alternative Defense

Defendant alleges that in the event the Court should find for plaintiffs that Max J. Kuney, Sr., as Trustee, and Max J. Kuney, Jr., as Trustee, were bona fide partners in Max J. Kuney Company for federal income tax purposes, plaintiffs are nevertheless not entitled to a refund of the entire amount claimed, since there has been an improper allocation of partnership income among the partners as claimed in the partnership returns for the years involved. A determination for the taxpayer on the issue raised by the complaint will require a reallocation of the income to the partners giving to each the share to which he is entitled, taking into consideration the earnings due to his labor and/or his capital contribution to the partnership. It is further

alleged that plaintiffs are required to prove that their taxes have been overpaid and the exact amount of such overpayment before they are entitled to any recovery of said tax.

Wherefore, defendant prays that the Complaint be dismissed with prejudice and the cost be assessed against the plaintiffs.

/s/ CHARLES P. MORIARTY,
United States Attorney,
Attorney for Defendant.

Duly verified.

[Endorsed]: Filed April 4, 1960.

[Title of District Court and Cause.]

Civil No. 4992

ANSWER

First Cause of Action

Defendant, William E. Frank, by his attorney in answer to the Complaint states:

1.

Admits the allegations contained in paragraph numbered I thereof.

2.

Admits the allegations contained in paragraph numbered II thereof.

3.

Admits the allegations contained in paragraph numbered III thereof.

4.

Admits the allegations contained in paragraph numbered IV thereof.

5.

Admits the allegations contained in paragraph numbered V thereof, except denies each and every allegation of fact set forth in the amended tax return and in the claim for refund.

6.

Admits the allegations contained in paragraph numbered VI thereof, except denies each and every allegation of fact set forth in the claim for refund.

7.

Admits the allegations contained in paragraph numbered VII thereof.

8.

Denies the allegations contained in paragraph numbered VIII thereof, except admits that the Commissioner of Internal Revenue assessed additional taxes on the grounds that Max J. Kuney, Sr., as Trustee, and Max J. Kuney, Jr., as Trustee, are not properly recognized for tax purposes as partners in Max J. Kuney Company, a partnership.

9.

Admits the allegations contained in paragraph numbered IX thereof.

10.

Admits the allegations contained in paragraph numbered X thereof, except denies each and every allegation of fact set forth in the claim for refund.

11.

Admits the allegations contained in paragraph numbered XI thereof, except denies each and every allegation of fact set forth in the claim for refund.

12.

Admits the allegations contained in paragraph numbered XII thereof.

13.

Admits the allegations contained in paragraph numbered XIII thereof.

14.

Admits the allegations contained in paragraph numbered XIV thereof.

15.

Denies the allegations contained in paragraph numbered XV thereof.

16.

Denies the allegations contained in paragraph numbered XVI thereof.

Alternative Defense

Defendant alleges that in the event the Court should find for plaintiff that Max J. Kuney, Sr., as

Trustee, and Max J. Kuney, Jr., as Trustee, were bona fide partners in Max J. Kuney Company for federal income tax purposes, plaintiff is nevertheless not entitled to a refund of the entire amount claimed, since there has been an improper allocation of partnership income among the partners as claimed in the partnership returns for the years involved. A determination for the taxpayer on the issue raised by the Complaint will require a reallocation of the income to the partners giving to each the share to which he is entitled, taking into consideration the earnings due to his labor and/or his capital contribution to the partnership. It is further alleged that plaintiffs are required to prove that their taxes have been overpaid and the exact amount of such overpayment before they are entitled to any recovery of said tax.

Wherefore, defendant prays that the Complaint be dismissed with prejudice and the case be assessed against the plaintiff.

/s/ CHARLES P. MORIARTY,
United States Attorney,
Attorney for Defendant.

Duly verified.

[Endorsed]: Filed April 4, 1960.

[Title of District Court and Cause.]

Civil No. 4990, 4991, and 4992

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure the defendant, by his attorney, moves the Court to enter an order of summary judgment against plaintiffs in each of the above-entitled cases on the ground that there is no genuine issue of any material fact concerning the provisions of the trust instruments created by taxpayers in 1952. A copy of each of the aforementioned trust instruments which were attached to the fiduciary returns of each of the trusts for the first taxable year (1952) are attached hereto and made a part hereof.

Without waiving any of the defenses heretofore raised by the defendant with respect to the family partnership issue, the defendant is, as a matter of law, entitled to judgment. This contention is founded on the fact that there is no issue concerning the evidentiary nature of the trust agreements. It is by virtue of said agreements that taxpayers claim to have created trustees as partners in the Max J. Kuney Company in, e.g., paragraphs VII and VIII of the complaints filed herein. The controls retained by the grantors makes the income taxable to said grantors by virtue of the pertinent sections of the Internal Revenue Code as judicially

interpreted by the Courts aside from the issues concerning the validity of the trustees as partners.

Defendant's points and authorities in support of this motion will be filed on or before the date set for hearing thereon.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ JOSEPH C. McKINNON,
Assistant United States
Attorney.

Certificate of service by mail attached.

[Endorsed]: Filed July 5, 1960.

[Title of District Court and Cause.]

Civil No. 4990, 4991, and 4992

PLAINTIFF'S AFFIDAVIT IN OPPOSITION
TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

County of Spokane,
State of Washington—ss.

I, Max J. Kuney, being first on oath duly sworn, depose and say:

I am the Trustee under that certain Trust Agreement dated February 11, 1952, between Max J. Kuney, Jr., and Constance K. Kuney, Grantors, and

myself as Trustee. I am the father of Max J. Kuney, Jr.

In my capacity as Trustee of said trust I have never been and am not now subservient to the will of the Grantor, Max J. Kuney, Jr. The Grantor expects me to and I do exercise my own judgment and discretion in the affairs of the trust estate, both with respect to the administration of the trust and distributions of income and corpus.

I am the Grantor of that certain trust dated February 11, 1952, between Max J. Kuney, as Grantor, and Max J. Kuney, Jr., as Trustee. The said Max J. Kuney, Jr., Trustee, is my son. My son in his capacity as Trustee has never been and is not now subservient to me in any manner whatsoever. I expect him to, and he does, exercise his own judgment and discretion in the affairs of such trust estate, both with respect to the administration of the trust and distributions of income and corpus.

/s/ MAX J. KUNEY.

Subscribed and sworn to before me this 20th day of July, 1960.

[Seal] /s/ ALLAN H. TOOLE,
Notary Public in and for the State of Washington,
Residing at Spokane.

[Endorsed]: Filed July 22, 1960.

[Title of District Court and Cause.]

Civil No. 4990, 4991, and 4992

PLAINTIFF'S AFFIDAVIT IN OPPOSITION
TO DEFENDANT'S MOTION FOR SUM-
MARY JUDGMENT

County of Spokane,
State of Washington—ss.

I, Max J. Kuney, Jr., being first on oath duly sworn, depose and say:

I am the Trustee under that certain Trust Agreement dated February 11, 1952, between Max J. Kuney as Grantor and myself as Trustee. I am the son of Max J. Kuney and am 42 years of age.

In my capacity as Trustee of said trust I have never been and am not now subservient to the will of the Grantor, Max J. Kuney. The Grantor expects me to and I do exercise my own judgment and discretion in the affairs of the trust estate, both with respect to the administration of the trust and distributions of income and corpus.

I am one of the Grantors of that certain trust dated February 11, 1952, between Max J. Kuney, Jr., and Constance K. Kuney as Grantors and Max J. Kuney as Trustee. The said Max J. Kuney, Trustee, is my father. My father in his capacity as Trustee has never been and is not now subservient to me in any manner whatsoever. I expect him to, and he does, exercise his own judgment and discretion in the affairs of such trust estate, both with respect to

the administration of the trust and distribution of income and corpus.

/s/ MAX J. KUNEY, JR.

Subscribed and sworn to before me this 19th day of July, 1960.

[Seal] /s/ WILLIAM B. PETERSEN,
Notary Public in and for the State of Washington,
Residing at Spokane.

[Endorsed]: Filed July 22, 1960.

[Title of District Court and Cause.]

Civil No. 4990, 4991, and 4992

MEMORANDUM DECISION

The record now before the court on defendant's motion for summary judgment, including the briefs of the parties and the authorities cited therein, has been fully examined.

Under *Helvering v. Clifford*, 309 U.S. 31 (1940), the ultimate question to be resolved in these cases is whether in each instance the trustor is shown by all of the facts and circumstances relating to the grant and conduct of the trust to be in substance and for practical purposes the owner of the trust corpus even though not technically so.

Defendant contends that an affirmative answer to the stated question is required as a matter of law on the face of the trust documents, such being the only basis on which summary judgment is sought or can be granted. In the particular circumstances now presented, the contention cannot be sustained. A trial on the merits is required to allow consideration of evidence as to all factors pertinent to the ultimate question for decision.

Defendant's motion for summary judgment is denied. Exception allowed.

Dated this 9th day of August, 1960.

/s/ GEORGE H. BOLDT,
United States District Judge.

[Endorsed]: Filed August 10, 1960.

[Title of District Court and Cause.]

Civil No. 4990, 4991, and 4992

PRE-TRIAL ORDER

As a result of pre-trial conferences heretofore had whereat the plaintiffs were represented by Allan H. Toole, E. Glenn Harmon and Scott B. Lukins, of Witherspoon, Kelley, Davenport & Toole, their attorneys, and defendant was represented by Charles P. Moriarty, United States Attorney, and Dale E. Anderson, Department of Jus-

tice, his attorneys, the following Issues of Fact and Law were framed and exhibits identified:

Admitted Facts:

The following are admitted facts:

1. These are civil actions against the District Director of Internal Revenue for the refund of income taxes paid by the plaintiffs for the years 1952, 1953 and 1954, arising under and by virtue of the Internal Revenue laws of the United States of which this Court has jurisdiction under the provisions of Title 28, United States Code, Section 1340. Said actions involve common questions of fact and law and are to be consolidated for trial pursuant to Rule 42 of the Federal Rules of Civil Procedure.

2. The plaintiffs are and at all times material hereto were citizens of the United States and over the age of 21 years. At all times material hereto the plaintiffs, Olive R. Kuney and Max J. Kuney, Sr., have resided in the City of Seattle, County of King, State of Washington, and the plaintiffs, Max J. Kuney, Jr., and Constance K. Kuney, were husband and wife, and have resided in the City of Spokane, County of Spokane, State of Washington.

3. The defendant, William E. Frank, is and at all times material hereto was duly appointed an acting District Director of Internal Revenue for the District of Washington, and said defendant is now

residing in the Western Judicial District of Washington.

4. For each of the calendar years involved in this proceeding, the plaintiffs timely filed with the defendant Federal Income tax returns indicating income taxes due, which were timely paid, as follows:

Plaintiff	Year	Amount of Tax
Olive R. Kuney.....	1952	\$ 70,104.10
Max J. Kuney, Sr.	1952	69,447.03
Max J. Kuney, Sr.	1953	22,605.64
Max J. Kuney, Sr.	1954	11,510.76
Max J. Kuney, Jr., and Constance K. Kuney.....	1952	133,988.06
Max J. Kuney, Jr., and Constance K. Kuney.....	1953	26,840.04
Max J. Kuney, Jr., and Constance K. Kuney.....	1954	19,557.12

5. On or about November 20, 1957, the Commissioner of Internal Revenue mailed to plaintiffs his statutory notices of deficiency ("90 Day Letter") determining deficiencies and overassessments against the plaintiffs for the years involved in this proceeding. On or about February 5, 1958, the plaintiffs paid or caused to be paid to the defendant the deficiencies so determined together with interest thereon and on or about March 31, 1958, the Commissioner paid to the plaintiffs the overassessments so determined together with interest thereon as follows:

Plaintiff	Calendar Year	Deficiency or (Overassessment) Determined	Interest Paid by Plaintiffs (Defendant)
Olive R. Kuney.....	1952	\$1,615.22	\$ 473.99
Olive R. Kuney.....	1952	(1,615.22)*	(692.87)
Max J. Kuney, Sr.	1952	1,087.24	319.05
Max J. Kuney, Sr.	1953	(1,427.23)	(343.94)
Max J. Kuney, Sr.	1954	7,080.12	1,192.66
Max J. Kuney, Jr., and Constance K. Kuney.....	1952	7,960.92	2,336.15
Max J. Kuney, Jr., and Constance K. Kuney.....	1953	(59.72)	(14.39)
Max J. Kuney, Jr., and Constance K. Kuney.....	1954	7,689.71	1,295.35

*Paid on or about December 1, 1959.

6. Timely claims for refund were filed by plaintiffs and were disallowed by registered letter from the Commissioner of Internal Revenue as follows:

Name	Date Claim Filed	Date Claim Disallowed	Taxable Year	Amount of Claim
Olive R. Kuney.....	12/ 2/54	3/18/58	1952	\$10,981.33
	2/20/56	3/18/58	1952	70,104.10
	4/22/58	9/15/58	1952	14,289.47
Partial Refund				
	2/13/59	11/24/59	1952	20,894.89
Max J. Kuney, Sr.....	12/ 2/54	3/18/58	1952	10,956.16
	2/13/56	3/18/58	1952	69,366.03
	4/12/58	9/15/58	1952	13,662.39
	12/ 2/54	2/18/58	1953	2,212.86
	4/10/58	9/15/58	1953	4,149.57
	4/12/58	9/15/58	1954	5,011.14
Max J. Kuney, Jr., & Constance K. Kuney	12/ 2/54	3/18/58	1952	20,827.04
	4/16/58	9/15/58	1952	35,076.95
	12/ 2/54	3/18/58	1953	2,012.70
	4/16/58	9/15/58	1953	5,085.09
	4/16/58	9/15/58	1954	5,791.67

These claims for refund were predicated principally upon the claim that Max J. Kuney Company was a valid partnership consisting of the following persons:

1. Max J. Kuney, Sr. (and his wife, Olive R. Kuney, as community property, for the calendar year 1952 only);

2. Max J. Kuney, Jr. (and his wife, Constance K. Kuney, as community property, for all three calendar years);

3. Max J. Kuney, Sr. (as trustee);

4. Max J. Kuney, Jr. (as trustee).

The claims for refund now before the Court are the following:

Name	Year	Amount
Olive R. Kuney.....	1952	\$14,289.47
Max J. Kuney, Sr.	1952	13,662.39
	1953	4,149.57
	1954	5,011.14
Max J. Kuney, Jr., and	1952	35,076.95
Constance K. Kuney	1953	5,085.09
	1954	5,791.67

7. On or about February 4, 1960, the date of filing the summons and complaints herein, no statute of limitations had run which would bar any of the plaintiffs herein from bringing an action for the recovery of any or all Federal income taxes and interest thereon paid by the plaintiffs for the calendar years 1952, 1953 and 1954.

8. The salaries paid by the partnership to the partners Max J. Kuney, Sr., and Max J. Kuney, Jr., for each of the calendar years involved in this proceeding were as follows:

Partner	1952	1953	1954
Max J. Kuney, Sr.	\$25,000.00	\$10,000.00	\$5,000.00
Max J. Kuney, Jr.	25,000.00	10,000.00	5,000.00

9. The income of the partnership, Max J. Kuney Company, for each of the calendar years involved in this proceeding, which was available for distribution among the partners for Federal income tax purposes (prior to allowance of partners' salaries) was as follows:

Class of Income	1952	Calendar Year 1953	1954
Ordinary income	\$419,346.59	\$85,796.42	\$55,571.02
Net long term capital gain	31,078.49	13,807.35	63,352.58

10. On or about February 11, 1952, Max J. Kuney Jr., and Constance K. Kuney as Grantors, and Max J. Kuney, Sr., as Trustee, made and executed a Trust Agreement, a copy of which is attached hereto as Plaintiffs' Exhibit No. 1.

11. On or about February 11, 1952, Max J. Kuney, Sr., as Grantor, and Max J. Kuney, Jr., as Trustee, made and executed a Trust Agreement, a copy of which is attached hereto as Exhibit No. 2.

12. The plaintiffs, Max J. Kuney, Jr., and Constance K. Kuney, each duly and timely filed with the District Director of Internal Revenue at Tacoma, Washington, Federal gift tax returns for the calen-

dar year 1952, each indicating a gift to Max J. Kuney, Sr., as Trustee under the Trust Agreement attached hereto as Plaintiffs' Exhibit No. 1 of one-half of an undivided interest in the donors' capital account in the partnership of Max J. Kuney Company equal to the sum of \$100,000.00. Copies of said Federal gift tax returns are attached hereto as Exhibits 3 and 4. Said plaintiffs also filed Washington State gift tax returns with Inheritance Tax Division of the Washington State Tax Commission at Olympia, Washington, for said calendar year indicating said gift. Copies of said Washington State gift tax returns are attached hereto as Exhibits 5 and 6. The plaintiffs, Max J. Kuney, Jr., and Constance K. Kuney, each duly and timely paid to the District Director of Internal Revenue the gift tax due as disclosed by said Federal gift tax returns, and to the Washington State Inheritance Tax Division the gift tax due as disclosed by said State gift tax returns.

13. The plaintiff, Max J. Kuney, Sr., duly and timely filed with the District Director of Internal Revenue at Tacoma, Washington, a Federal gift tax return for the calendar year 1952, indicating a gift to Max J. Kuney, Jr., as Trustee under the Trust Agreement attached hereto as Exhibit No. 2 of an undivided interest in the donor's capital account in the partnership of Max J. Kuney Company equal to the sum of \$100,000.00. A copy of said Federal gift tax return is attached hereto as Plaintiffs' Exhibit No. 7. Said plaintiff also filed a Washington State

gift tax return with the Inheritance Tax Division of the Washington State Tax Commission at Olympia, Washington, for said calendar year indicating said gift. A copy of said Washington State gift tax return is attached hereto as Exhibit No. 8. The plaintiff, Max J. Kuney, Sr., duly and timely paid to the District Director of Internal Revenue the gift tax due as disclosed by said gift tax return, and duly and timely paid to the Washington State Tax Commission the gift tax due as disclosed by said State gift tax return.

14. During each of the calendar years involved in this proceeding capital was a material income producing factor in the partnership of Max J. Kuney Company.

15. During each of the following calendar years the following distributions of trust income were made in cash by Max J. Kuney as Trustee to the following named beneficiaries of the trusts created by Max J. Kuney, Jr., and Constance K. Kuney, to wit:

Date	Distributee (Beneficiary)	Trust for Benefit of		
		Caroline I. Kuney	Max J. Kuney, III	John Richardson Kuney
1952	Caroline I. Kuney.....	\$10,000.00		
	Max J. Kuney, III		\$10,000.00	
	Lorraine B. Kuney.....	1,800.00	1,800.00	
	C. H. & Mabel Bentley....	2,400.00	2,400.00	
	John R. Kuney.....			\$18,788.72
1953	Lorraine B. Kuney.....	1,000.00	1,000.00	
	C. H. & Mabel Bentley....	2,400.00	2,400.00	
1954	C. H. & Mabel Bentley....	2,400.00	2,400.00	

16. For each of the calendar years involved in this proceeding, the partnership timely filed Federal partnership income tax returns. Copies of said income tax returns are attached hereto as plaintiffs' Exhibits 9 through 11 as shown by the following table:

Partnership Return of Income for Year	Exhibit Number
1952 (original)	9
1952 (amended)	10
1953 (original)	11
1953 (amended)	12
1954	13

17. For each of the calendar years involved in this proceeding, Max J. Kuney, Jr., as Trustee for John R. Kuney; Max J. Kuney as Trustee for Caroline I. Kuney; and Max J. Kuney as Trustee for Max J. Kuney, III, timely filed Federal fiduciary income tax returns and paid the income taxes due per said returns. Copies of said income tax returns are attached hereto as plaintiffs' Exhibits 14 through 22, as shown by the following table:

Taxpayer	Year	Tax Paid	Exhibit Number
Max J. Kuney, Jr., as Trustee for John R. Kuney.....	1952	\$7,157.96	14
Max J. Kuney, Jr., as Trustee for John R. Kuney.....	1953	2,012.54	15
Max J. Kuney, Jr., as Trustee for John R. Kuney.....	1954	1,211.58	16
Max J. Kuney as Trustee for Caroline I. Kuney.....	1952	2,378.00	17
Max J. Kuney as Trustee for Caroline I. Kuney.....	1953	268.70	18
Max J. Kuney as Trustee for Caroline I. Kuney.....	1954	286.72	19

Taxpayer	Year	Tax Paid	Exhibit Number
Max J. Kuney, Sr., as Trustee for Max J. Kuney, III.....	1952	2,378.00	20
Max J. Kuney, Sr., as Trustee for Max J. Kuney, III.....	1953	268.70	21
Max J. Kuney, Sr., as Trustee for Max J. Kuney, III.....	1954	286.72	22

Said amounts of tax plus interest was refunded to the trusts by the Commissioner of Internal Revenue.

Issues of Fact

The following are the Issues of Fact to be determined by the jury herein:

1. Under all the facts and circumstances, were the trusts hereinabove referred to, created by Max J. Kuney, Sr., and by Max J. Kuney, Jr., and Constance K. Kuney, valid and effective transfers in trust for Federal income tax purposes? The answer to this question depends on all the facts and circumstances surrounding the creation of said trusts, the conduct and operation of the business and of the trusts and the rights and duties contained in the pertinent instruments.

2-A. Was Max J. Kuney, Sr., as Trustee of the trust created by Max J. Kuney, Jr., and Constance K. Kuney, subservient to the wishes of the Grantor, Max J. Kuney, Jr., in deciding to accumulate the remaining trust income for the benefit of the minor beneficiaries rather than distributing the same? If he were subservient, then one-half of the trust income is taxable to such grantor for the year 1954.

B. Was Max J. Kuney, Jr., as Trustee of the trust created by Max J. Kuney, Sr., subservient to the wishes of said Grantor in deciding to accumulate the income of the trust for the benefit of the minor beneficiary rather than distributing the same? If he was subservient, defendant is entitled to judgment for the year 1954.

3-A. During each of the calendar years involved in this proceeding, was Max J. Kuney, Sr., as Trustee under the Trust Agreement hereinabove referred to, the real owner for Federal income tax purposes of a partnership interest in Max J. Kuney Company, a partnership? Did the grantor retain controls over the trust property which were inconsistent with a bona fide transfer of ownership?

B. During each of the calendar years involved in this proceeding, was Max J. Kuney, Jr., as Trustee under the Trust Agreement hereinabove referred to, the real owner for Federal income tax purposes of a partnership interest in Max J. Kuney Company, a partnership? Did the grantor retain controls over the trust property which were inconsistent with a bona fide transfer of ownership.

4. Were the salaries paid to Max J. Kuney, Sr., and Max J. Kuney, Jr., during each of the calendar years involved in this proceeding by Max J. Kuney Company, a partnership, reasonable compensation for services rendered to the partnership by said persons? If not, what were reasonable salaries to be paid to such persons during such years for such purposes?

5. There is no issue of fact regarding the legality of the trusts under the Laws of Washington. There is an issue of fact as to the validity of the trusts as partners in the Max J. Kuney Company under the Laws of Washington.

Issues of Law

1. Does the Court's denial of defendant's motion for summary judgment herein preclude further consideration at this time of whether the grantors are taxable on the trust income as a matter of law under Section 167 of the 1939 Code or Section 677 of the 1954 Code? If the answer to this question is negative, then the following Issues of Law are presented:

(a) Was the income of each of the trusts distributable to the grantors of those trusts by the respective trustees as parents within the meaning of Section 167 of the 1939 Code and of Section 677 of the 1954 Code?

(b) As a matter of law, are any funds which may be distributed to a parent-grantor under Art. I, Sec. 6 (of the trust wherein Max J. Kuney, Sr. is the grantor) or Art. II, Sec. 7 (of the trust wherein Max J. Kuney, Jr., and Constance K. Kuney are the grantors) of the trusts subject to any fiduciary obligation on the part of the parent-grantor in the application or use thereof?

2. Were the trusts hereinabove mentioned legal and valid members of the partnership of Max J. Kuney Company during the years involved in this

proceeding under the laws of the State of Washington? Among the factors to be considered are:

(a) Under the laws of the State of Washington, is the legal existence of a partnership affected in any manner by such partnership's failure to file a certificate of assumed business name as described in R.C.W. 19.80.010?

(b) Under R.C.W. 19.80.010, is a partnership required to file a certificate of assumed business name where its name is "Max J. Kuney Co.," and the partners thereof are Max J. Kuney, individually and as trustee for others, and Max J. Kuney, Jr., individually and as trustee for another?

3. Are the Treasury Regulations 118, Sec. 39.22 (a)-21(d) to be given the force and effect of law? If they are to be given the effect of law, are they applicable to these cases?

Plaintiffs' Contentions

1. By means of the trust agreements described above a gift of a capital interest worth \$100,000.00 in the partnership of Max J. Kuney Company was made by Max J. Kuney, Sr., and a gift of a capital interest worth \$50,000.00 was made by Max J. Kuney, Jr. and a similar gift was made by Constance K. Kuney.

2. The trusts created by the Trust Agreements referred to above were valid and effective trusts for Federal income tax purposes and the income of the trusts during each of the calendar years involved in this proceeding was properly taxed to the trust,

or, in the case of distributed income, to the beneficiaries thereof.

3. The Trustees under the aforesaid trusts became, under the laws of the State of Washington, valid and legal members of the partnership of Max J. Kuney Company, a partnership, and the following partners were the real owners of their respective capital interests in the partnership for Federal income tax purposes:

A. Max J. Kuney Sr. (and Olive R. Kuney, as community property, for the calendar year 1952 only);

B. Max J. Kuney Jr. (and Constance K. Kuney, as community property, for the calendar years 1952, 1953 and 1954);

C. Max J. Kuney, Sr., as Trustee; and

D. Max J. Kuney, Jr., as Trustee.

4. The salaries paid by the partnership of Max J. Kuney, Sr., and Max J. Kuney, Jr., during each of the calendar years involved in this proceeding were not less than reasonable compensation to said persons for services rendered to the partnership by said persons.

5. During the calendar years involved in this proceeding, the net income of the partnership (after deduction of reasonable salaries paid to Max J. Kuney, Sr., and Max J. Kuney, Jr.) was properly distributed for Federal income tax purposes among the partners in accordance with the profit sharing ratio described in the Stipulation below.

6. By reason of the Court's denial of defendant's motion for a summary judgment herein, the Court has determined that the income of the trust is not taxable to the Grantors as a matter of law under Sec. 167 of the 1939 Code and Sec. 677 of the 1954 Code. In any event, if a trustee were to distribute income to the parent-grantor pursuant to the terms of either trust, such funds would be held by the parent-grantor in a fiduciary capacity; under no circumstances would such a distribution be to a "grantor" within the meaning of Section 677(a) of the 1954 Code or Section 167 of the 1939 Code.

7. Neither of the trustees was subservient to the wishes of the grantors of the respective trusts in the year 1954 in deciding to accumulate or distribute trust income.

8. R.C.W. 19.80.010 relating to filing a certificate of assumed business name has no relevance to the legal existence of a partnership under the laws of the State of Washington. In any event, a proper certificate of assumed business name was filed with the County Clerk of Spokane County, Washington.

Defendant's Contentions

1. That as a matter of law a trustee is not an adverse party to a trust unless he has a beneficial interest in the trust corpus.

2. That the trusts provided that income of the trusts could be distributed to the grantors of the trusts.

3. That the grantors of these trusts are not trustees as to their own children unless so appointed by a Court of law or by a legal document which designates them as trustee for such purpose.

4. That no such designation of these parents as trustee for their own children was ever made by any legal document or legal action.

5. That because of the existence of the facts alleged in paragraphs 1 through 4 supra the defendant is entitled as a matter of law to prevail pursuant to section 167 of the 1939 Code and section 677 of the 1954 Code. That this section is not controlled by the so-called "Clifford" rules since it has been in the Code since 1924 and is subject to being literally interpreted by this Court.

6. That the plaintiffs of this action did not comply with the statute of the State of Washington in creating a valid and legally existing partnership.

7. That plaintiffs merely assigned a share of the partnership income to the trusts which they set up and did not make the trusts partners as such.

8. That even if the plaintiffs did convey a part of the capital of the partnership to the trusts that the plaintiffs retained too many strings on the transfer of such capital. There was no bona fide transfer of the entire bundle of ownership rights in this property.

This is so because:

(a) The trustees were the partners themselves.

(b) The trustees were not required by any provision in the trust instrument to ever pay any of the corpus to the beneficiaries named in the trust.

(c) The trustees were not required by any provision in the trust instrument to ever pay to the named beneficiaries any of the income accrued before each such beneficiary reached the age of 30.

(d) That the trustees therefore retained absolute control over this trust corpus and income accumulated to age 30 until 21 years after the death of each named beneficiary of the trust.

(e) The trustees and grantors were related as father and son.

(f) The trustees and grantors were related as partners in the Max J. Kuney Company.

(g) That the grantors did transfer a substantial part of the original partnership business to a corporation in which the trusts have no interest. The trusts were not compensated for the loss of value upon such transfer.

(h) That the grantor-trustees had absolute control over the amount of salaries to be drawn by them as partners.

(i) That the grantor-trustees had control over how much income would go to the trusts by controlling the rental rate on equipment leased to a corporation controlled by the grantor-trustees.

(j) That the grantor-trustees had unrestricted power to either increase or decrease their own cap-

ital accounts and thus change the share of the income to be distributed to the trusts.

(k) That the grantor-trustees had unrestricted power to reduce the trust capital accounts and thus increase or reduce the trust's share of the profits. Trust capital could be withdrawn and investment elsewhere or even kept in the business but in the form of loans at fixed interest rather than as capital interests entitled to a share of the profits.

9. That the trustee-grantors were subservient to each other both directly and indirectly in their relationship as partners in the Max J. Kuney Company, and as father and son.

10. That section 167 of the 1939 Code and section 677 of the 1954 Code requires that any trust income be taxed to the grantors of these trusts.

11. That section 674 of the 1954 Code requires that the grantors of these trusts be taxed on the income therefrom for the year 1954 because taxpayers cannot prove by a preponderance of the evidence that they are not subservient parties as provided by section 672(c) of the 1954 Code.

12. That Treasury Regulations 118, Sec. 39.22 (a)-21(d)(2) must be given the effect of law and that these Regulations require that the grantors of these trusts be treated as owners.

Exhibits

The exhibits of all parties below listed were produced and marked and may be received in evidence

if otherwise admissible without further authentication, it being admitted that each is what it purports to be.

Plaintiffs' Exhibits

Exhibit

- | No. | Description |
|-----|---|
| 1— | Trust Agreement dated February 11, 1952, between Max J. Kuney Jr. and Constance K. Kuney as grantors, and Max J. Kuney, as Trustee. |
| 2— | Trust Agreement dated February 11, 1952, between Max J. Kuney as grantor, and Max J. Kuney, Jr., as Trustee. |
| 3— | 1952 Federal gift tax return of Max J. Kuney, Jr. |
| 4— | 1952 Federal gift tax return of Constance K. Kuney. |
| 5— | 1952 Washington state gift tax return of Max J. Kuney, Jr. |
| 6— | 1952 Washington state gift tax return of Constance K. Kuney. |
| 7— | 1952 Federal gift tax return of Max J. Kuney, Sr. |
| 8— | 1952 Washington state gift tax return of Max J. Kuney, Sr. |
| 9— | Original 1952 partnership income tax return of Max J. Kuney Company. |
| 10— | Amended 1952 partnership income tax return of Max J. Kuney Company. |
| 11— | Original 1953 partnership income tax return of Max J. Kuney Company. |

Exhibit

No.	Description
12—	Amended 1953 partnership income tax return of Max J. Kuney Company.
13—	1954 partnership income tax return of Max J. Kuney Company.
14—	1952 fiduciary income tax return of Max J. Kuney, Jr., as trustee of John R. Kuney.
15—	1953 fiduciary income tax return of Max J. Kuney, Jr., as trustee for John R. Kuney.
16—	1954 fiduciary income tax return of Max J. Kuney, Jr., as trustee for John R. Kuney.
17—	1952 income tax return of Max J. Kuney, Sr., as trustee for Caroline I. Kuney.
18—	1953 fiduciary income tax return of Max J. Kuney, Sr., as trustee for Caroline I. Kuney.
19—	1954 fiduciary income tax return of Max J. Kuney, Sr., as trustee for Caroline I. Kuney.
20—	1952 fiduciary income tax return of Max J. Kuney, Sr., as trustee for Max J. Kuney, III.
21—	1953 fiduciary income tax return of Max J. Kuney, Sr., as trustee for Max J. Kuney, III.
22—	1954 fiduciary income tax return of Max J. Kuney, Sr., as trustee for Max J. Kuney, III.
23—	General ledger journal voucher No. 877 of books of account of Max J. Kuney Company.
24—	Agreement dated February 11, 1952, between Max J. Kuney, Sr. and Max J. Kuney, Jr., as Trustee, with respect to division of profits.

Exhibit

No.	Description
25—	Agreement dated February 11, 1952, between Max J. Kuney, Jr. and Max J. Kuney, Sr., as trustee, with respect to division of profits.
26—	Letter from Max J. Kuney, Sr., as trustee, to Max J. Kuney, Jr., dated December 3, 1952, re distribution of trust income.
27—	Letter from Max J. Kuney, Sr., trustee, to Max J. Kuney, Jr., dated December 22, 1952, re distribution of trust income.
28—	Letter from Max J. Kuney, Jr., to Inheritance Tax Division, Washington State Tax Commission, dated April 7, 1953.
29—	Letter from Max J. Kuney, Jr., to Inheritance Tax Division, Washington State Tax Commission, dated August 7, 1953.
30—	Financial statements of Max J. Kuney Company for year ended December 31, 1952.
31—	Financial statements of Max J. Kuney Company for year ended December 31, 1953.
32—	Financial statements of Max J. Kuney Company for year ended December 31, 1954.
33—	Rental Agreement dated May 14, 1953, between Max J. Kuney Company, a partnership, and Max J. Kuney Company, a corporation.
34—	Certified copy of Certificate of Firm Name filed by Max J. Kuney Company, dated July 2, 1945.
35—	Certified copy of Certificate of Firm Name filed by Max J. Kuney Company, dated March 27, 1953.

Exhibit

No.

Description

- 36—Letter of May 1, 1956, and attachments to Dun & Bradstreet, Inc.
- 37—Company books and records.
- 38—1955 partnership tax returns thru 1959.
- 39—1953 thru 1959 Max Kuney Co. (Inc.) corporate tax returns.

Stipulation

It Is Hereby Stipulated between the parties that if the jury finds for the plaintiff as to any of the years in controversy, the parties will submit computations to the Court of the tax refunds due the plaintiff on the basis that after the payment of reasonable salaries to Max J. Kuney, Sr., and Max J. Kuney, Jr., the remaining net profits of the partnership were to be divided among the partners as follows:

A. One-half thereof to be paid to Max J. Kuney, Sr., and to Max J. Kuney, Jr., as Trustee for John R. Kuney, to be divided between said two partners in the same ratio as their two capital accounts bore to each other on January 1st of each year; and

B. One-half thereof to be paid to Max J. Kuney, Jr., and to Max J. Kuney, Sr., as Trustee for Max J. Kuney III and Caroline I. Kuney, to be divided between said two partners in the same ratio as their two capital accounts bore to each other on January 1st of each year.

Action by the Court

The Court has ruled that the above-entitled actions shall be consolidated for trial before a jury.

The foregoing pre-trial order has been approved by the parties hereto, as evidenced by the signatures of their counsel hereon, and this order is hereby entered, as a result of which the pleadings pass out of the case, and this pre-trial order may be amended only by order of the Court pursuant to agreement of the parties upon reasonable notice or to prevent manifest injustice.

Dated this 4th day of November, 1960.

/s/ GEORGE H. BOLDT,

United States District Judge.

Form Approved:

/s/ ALLAN H. TOOLE,

Attorney for Plaintiffs.

/s/ DALE E. ANDERSON,

Attorney for Defendant.

[Endorsed]: Filed November 7, 1960.

[Title of District Court and Cause.]

Civil No. 4990, 4991, and 4992

MOTION FOR DIRECTED VERDICT

The defendant, William E. Frank, by his attorney, moves this Court to grant defendant a directed verdict for the following reasons:

1. Sections 167 of the 1939 Code and 677 of the 1954 Code provide that a grantor of a trust shall

be treated as owner of the trust if the trust income may be distributed to the grantor without the approval or consent of any adverse party, "Nowhere in Sections 167 [1939 Code] or 677 [1954 Code] is there any suggestion that the * * * trust income must actually be distributed to the grantor in order to make the section applicable." *Kent v. Rothensies*, 120 F. 2d 476, 479 (C.A. 3d). This statute is not one of the so-called "Clifford" statutes since it has been in the law since 1924 and states the law independently of the Clifford rules. Here the statute says the grantor "shall be treated as owner" if the above-mentioned conditions are present. Applicability of this statute is not restricted to cases where the grantor is in substance and for practical purposes the owner of the trust corpus even though not technically so. The grantor is treated as owner simply because he created this kind of a trust, without regard to the conduct of the trust. Taxpayer has failed to show that the statute is not applicable.

2. The only exception which could abate the force of the statute upon the trusts in these cases was not shown to be applicable.

(a) The trustee was not an adverse party.

(b) The trust income could be distributed to the grantor during the minority of the children.

(c) The children were minors at all times pertinent hereto.

(d) The income could be used for the support or maintenance of the grantor's children who he was legally obligated to support.

(e) The grantor of each trust was not a trustee as to his own children. (See (g) and (h) below.)

(f) The grantor had the right to apply the trust income distributed by the trustee in any way he saw fit for the maintenance, education, enjoyment, health, and welfare, of his children.

(g) Revised Code of Washington provides:

Section 26.16.140 Earnings of wife and minor children living apart. The earnings and accumulations of the wife and of her minor children living with her, or in her custody while she is living separate from her husband, are the separate property of the wife.

and Section

26.16.125 Custody of children. Henceforth the rights and responsibilities of the parents in the absence of misconduct shall be equal, and the mother shall be as fully entitled to the custody, control and earnings of the children as the father, and in case of the father's death, the mother shall come into as full and complete control of the children and their estate as the father does in case of the mother's death.

These statutes are clear in providing that a parent does own the income of his child. A parent is obviously not a trustee of his children's income.

(h) If a parent were a trustee he would be governed by the Trustee's Accounting Act—Chapter 30.30 of RCW. This Act, Section 30.30.030 provides:

Intermediate and final accounts—Contents—Filing. In addition thereto any such trustee or trustees whenever it or they so desire, may file in the superior court of the county in which the trustees or one of the trustees resides an intermediate account under oath showing:

- (1) The period covered by the account;
- (2) The total principal with which the trustee is chargeable according to the last preceding account or the inventory if there is no preceding account;
- (3) An itemized statement of all principal funds received and disbursed during such period;
- (4) An itemized statement of all income received and disbursed during such period, unless waived;
- (5) The balance of such principal and income remaining at the close of such period and how invested;
- (6) The names and addresses of all living beneficiaries, including contingent beneficiaries, of the trust, and a statement as to any such beneficiary known to be under legal disability;
- (7) A description of any possible unborn or unascertained beneficiary and his interest in the trust fund.

In addition thereto, after the time for termination of the trust shall have arrived, the trustee or trustees may file a final account in similar manner.

30.30.020 Trustee's annual statement. The trustee or trustees appointed by any will, deed or agreement heretofore or hereafter executed shall mail or deliver at least annually to each adult income trust beneficiary a written itemized statement of all current receipts and disbursements made by the trustee of the funds of the trust both principal and income, and upon the request of any such beneficiary shall furnish him an itemized statement of all property then held by such trustee, and may also file any such statement in the superior court of the county in which the trustee or one of the trustees resides.

No such statements were in fact prepared or sent.

(i) A parent is not a legal guardian of a child unless so appointed by a court. Therefore, these parents are not excused by Section 30.30.010 from making such a report if they are in fact trustees over the property of their own children. Section 30.30.010 excuses, e.g., executors, administrators or guardians from the trust reporting requirements. These parents were never appointed as legal guardians over their children and were hence not controlled by the laws relating to guardians.

(j) The possibility that the grantor-parent could receive this income which could be used to satisfy his legal obligation to support his children (where as parent he has this power not as a trustee) makes the trust income taxable to him as owner.

The foregoing is supported both by the evidence adduced the terms of the statute and by the committee reports establishing the exception (S. Rep.

No. 627, 78th Cong., 1st Sess., p. 68 (1944 Cum. Bull. 973, 1023). The exception:

* * * is not applicable if discretion to apply or distribute the trust income for support, maintenance, or education rests solely in the grantor or in the grantor in conjunction with other persons unless the grantor has such discretion as trustee.

3. Plaintiffs have failed to produce evidence that they are entitled to a refund since they have not shown that Treasury Regulations 118, Section 39.22 (a)-21(d) (2) (iii) are not applicable for the years 1952 and 1953. They have also failed to produce evidence that Section 674 of the 1954 Code does not require that they be treated as the owners of the trusts.

4. Plaintiffs have failed to produce evidence that the trusts qualified as partners in the family partnership since there was an absence of the passage of the requisite ownership of property from the grantors to the trust. Stated otherwise, the grantor's of these trusts retained too many of the incidents of ownership to allow the trusts to qualify as bona fide partners in this family partnership.

5. Plaintiffs have failed to produce evidence that they are entitled to a refund for any reason.

/s/ CHARLES P. MORIARTY,
United States Attorney,
Attorney for Defendant.

[Endorsed]: Filed November 22, 1960.

[Title of District Court and Cause.]

Civil No. 4990, 4991 and 4992

RENEWAL OF DEFENDANT'S MOTION
FOR A DIRECTED VERDICT

Now comes the defendant, by his attorney, at the close of the introduction of all of the evidence in the trial of this case and renews his motion for a directed verdict and for judgment for the defendant made at the close of the introduction of the evidence for plaintiff, defendant again moves the Court to instruct and direct the jury to find and return a verdict for the defendant and to enter judgment for the defendant dismissing the Complaint upon the same grounds which were stated in his original motion.

/s/ CHARLES P. MORIARTY,
United States Attorney,
Attorney for Defendant.

[Endorsed]: Filed November 22, 1960.

[Title of District Court and Cause.]

Civil No. 4990, 4991 and 4992

VERDICT

We, the Jury in the Above-Entitled Causes,
Find as Below Stated:

On a consideration of all facts and circumstances shown by the evidence and under the law given you

by the Court, do you find the status of Kuney Sr. and Kuney Jr. in their trustee capacity (separate and apart from their personal capacity) as partners in the Kuney family partnership genuine, bona fide and valid for income tax purposes?

Answer yes or no.

Yes.

Dated: 11/23/60.

/s/ ALFRED W. CLARKE, JR.,
Foreman.

[Endorsed]: Filed November 23, 1960.

[Title of District Court and Cause.]

Civil No. 4990, 4991 and 4992

DEFENDANT'S MOTION FOR JUDGMENT
NOTWITHSTANDING THE JURY'S VER-
DICT AND THE ALTERNATIVE FOR A
NEW TRIAL PURSUANT TO RULES
50(b) AND 59 OF THE FEDERAL RULES
OF CIVIL PROCEDURE.

Defendant, William E. Frank, moves this Court, pursuant to Rules 50(b) and 59 of The Federal Rules of Civil Procedure, and Rule 48 of the Local Rules, Western District of Washington, to have the verdict set aside and judgment entered in accordance with his motion for a directed verdict

and in the alternative for a new trial on the following grounds:

I.

1. Defendant is, as a matter of law, entitled to judgment even if the trusts are properly held to be bona fide partners for tax purposes. The sole and only question presented to the jury was the bona fides of the trustees as partners. The jury's verdict on that question is believed to be clearly erroneous as set forth under II below. However, as was pointed out in defendant's memorandum in support of his motion for summary judgment, the question still remains in this case as to whether the grantors of the trusts are, for practical purposes, the owners of the trust corpus and income even though not technically such owners.

The defendant relies principally on §167 of the 1939 Code and §677 of the 1954 Code as entitling him to judgment non obstante veredicto as set forth in his motion for a directed verdict filed at the conclusion of plaintiff's evidence.

The terms of §677 of the 1954 Code (which will be referred to here rather than §167 of the 1939 Code, as both are substantially the same) are entirely satisfied and should be applied. This section is not one of the so-called Clifford statutes as it has been in the law since 1924. Its provisions are not simple, but upon consideration are clearly applicable to the facts of this case.

(i) The trustee of each trust is not an adverse party, as that term is defined in §672(a) of the

1954 Code. To be an adverse party the trustee would have to hold a beneficial interest in the trust property itself so that he would be adversely affected in his own right if he should elect to pay out trust funds to the grantor of the trust. There is no dispute in this case concerning the fact that the trustees are non-adverse parties.

(ii) The income of the trusts may be distributed to the grantors of the trusts per the provisions of the trust instrument (Ex. 1, p. 5).

(iii) The exception to the general rule of §677(a) is not applicable here because the parent, grantors of the trusts are not trustees as to their own children. They were never appointed as guardians and are not required to exercise the care of a fiduciary in dealing with funds for the maintenance, education, enjoyment, health and welfare of their own children. Washington Revised Code, §26.16.125, provides that the parent is entitled to custody and control over the property or earnings of his children. Unless he is a trustee, he may use such property as he deems to his own best interest without possibility of judicial review.

The trust instrument specifically absolves the trustee from judicial review of his actions (Ex. 1, p. 3) and absolves him from all responsibility for the application of the funds paid over to the guardian or parent of the children (who were in all cases the grantors of the trusts) (Ex. 1, p. 5).

(iv) The exception to the general rule of §677 clearly does not apply to this case as was spelled out by the Congressional Reports relating to this exception (S. Rep. No. 627, 78th Cong., 1st Session, p. 68) (1944 Cum. Bull. 973, 1023); the exception:

“* * * is not applicable if discretion to apply or distribute the trust income for support, maintenance, or education rests solely in the grantor or in the grantor in conjunction with other persons unless the grantor has such discretion as trustee.” (Emphasis added.)

It will be a strange new rule of law in this State if it is determined that a parent is a trustee over property held for the benefit of his children even when he is not appointed as such by a judicial tribunal or is so designated by the instrument which transfers the right to receive the property to the parent in the first place.

2. Although §677 of the 1954 Code is not a so-called Clifford statute, the applicable statutes and the rationale of the Clifford case, 309 U.S. 31 (1940) does entitle the defendant to judgment non obstante veredicto because the trustor was shown by all the facts and circumstances relating to the grant and conduct of the trust to be in substance and for practical purposes the owner of the trust corpus even though not technically so.

The question of practical ownership was not put to the jury, and is a matter of law, on consideration

of the facts and circumstances to be considered by the Court after it is determined that the trustees were bona fide partners in the partnership. If they were not so found, this present question would be entirely moot.

This issue was not conceded by the defendant at any time and is preserved as a legal issue in the pre-trial order (p. 11) under issue of law No. 1.

II.

1. There was an insufficiency of the evidence to justify the verdict.

2. The verdict was contrary to the evidence and to the clear weight of the evidence.

3. The evidence did not establish facts sufficient to prove the plaintiffs' cause of action or to justify the verdict in favor of the plaintiffs.

A. The evidence proved beyond any reasonable doubt that there was a direct retention of control by the grantors of the trusts over:

(i) Income distribution.

(ii) Assets essential to the partnership business.

(iii) Trust corpus and accumulated income.

(iv) Management powers over salaries, allocation of shares of income, investments to be used in the partnership business or in related businesses, business to be done by the partnership, income to be earned by the partnership by control over the

sole source of income to the partnership, e.g., rental charges to be paid for the rental of equipment used by the grantors in a construction business in which the trusts had no interest.

(v) Sale or liquidation of the trusts' interests.

B. There were direct controls by the grantors over actions of other trustee partners since no partner has a right to act without consulting the other partners. Revised Code of Washington, §25.04.240 gives each partner the "right to participate in the management" of the business.

C. There were in addition to the direct controls mentioned in (B) supra indirect controls which were exercised by the donors through:

(i) A separate business organization — the Kuney Co. corporation in which only the grantors held interests and which rented all the partnership's fixed assets and performed the construction contracts.

(ii) Joint crossed trusts by virtue of which each donor had the power to control the funds of his trustee. Any action contrary to the grantors' wishes were subject to reciprocal action by the grantor against the trustee's own trust.

(iii) By familial relationship since both grantors and trustees were, partners and father and son.

D. Income was distributed to the trusts by book entry only and was entirely controlled by the re-

spective grantors without possibility of judicial review. (Ex. 1, p. 3) (trust instrument.) The shares of income were subject to adjustment by the grantors and was in fact adjusted by the grantors without benefit of any disinterested judgment.

E. After income was distributed by book entry its investment, withdrawal, loan to business controlled and owned by grantors was entirely at the discretion of the grantors. There was no restriction in any trust or partnership agreement which would impose any restriction whatever on the grantors of the trusts in the use or distribution of the funds.

F. There was no recognition of trusts as partners in complying with local partnership, fictitious names and business registration statutes, even though compliance with the statute was made, as to the grantor partners, in 1945 (Ex. 34) and in 1953 (Ex. 35). The last document filed was over a year after the creation of the trusts with no mention whatever of trusts being partners.

G. The partnership agreements (Exs. 24 and 25) do not establish the trusts as partners in the partnership business but merely give the trusts the right to receive a distribution of "total Max J. Kuney income." No agreement as to the trust being a partner in the partnership business was ever entered into.

H. The only written agreements, records, or memoranda ever filed were for tax purposes without

any corresponding recognition for business purposes of the trusts as partners, subject to the rights, obligations and privileges of partners.

III.

In the event the requests under paragraphs I and II are not granted, the defendant requests a new trial to resolve any disputed questions of fact or law or to permit a verdict to be entered in conformity with the facts of the case. Defendant further requests opportunity for filing briefs. Brief to be filed within 30 days from receipt of transcript of proceedings.

/s/ CHARLES P. MORIARTY,
United States Attorney.

/s/ DALE E. ANDERSON,
Trial Attorney, Dept. of
Justice.

Certificate of service by mail attached.

[Endorsed]: Filed November 25, 1960.

United States District Court, Western District of
Washington, Northern Division

Civil No. 4990

MAX J. KUNEY, JR., and CONSTANCE K.
KUNEY, Husband and Wife,

Plaintiffs,

vs.

WILLIAM E. FRANK,

Defendant.

Civil No. 4991

MAX J. KUNEY, SR.,

Plaintiff,

vs.

WILLIAM E. FRANK,

Defendant.

Civil No. 4992

OLIVE R. KUNEY,

Plaintiff,

vs.

WILLIAM E. FRANK,

Defendant.

JUDGMENT NOTWITHSTANDING THE
VERDICT OF THE JURY

The above-entitled action having come on for trial before this Court on November 23, 1960, with jury, the plaintiffs and defendant appearing by their respective attorneys, the jury having rendered

a verdict in favor of the plaintiffs and defendant having filed a motion for judgment notwithstanding the verdict on November 25, 1960 and upon consideration of the stipulation of facts in the pre-trial order, the exhibits, the briefs, and oral arguments of the parties, and the entire record, and the Court having rendered its decision on defendant's motion on March 22, 1961, which decision is made a part hereof by reference, it is hereby

Ordered, Adjudged and Decreed that plaintiffs are not entitled to any recovery prayed for in the complaints and defendant's motion for judgment notwithstanding the verdict rendered by the jury having been granted, judgment is hereby entered for the defendant dismissing plaintiffs' complaints, with prejudice, and with costs, if any, to be assessed against plaintiffs.

Done in Open Court this 24th day of April, 1961.

/s/ GEORGE H. BOLDT,
United States District Judge.

Approved as to form:

/s/ JOSEPH C. McKINNON,
Assistant U. S. Attorney.

Copy received and Notice of Presentment waived.

/s/ E. GLENN HARMON,
Of Attorneys for Plaintiffs.

[Endorsed]: Filed April 24, 1961.

Entered: April 25, 1961.

[Title of District Court and Cause.]

Civil No. 4990

NOTICE OF APPEAL

Notice Is Hereby Given that Max J. Kuney, Jr., and Constance K. Kuney, husband and wife, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment of dismissal entered March 22, 1961, on granting defendant's motion for Judgment Notwithstanding the Verdict of the Jury, and from the Judgment Notwithstanding the Verdict of the Jury entered on the civil docket on April 25, 1961.

Dated this 17th day of May, 1961.

/s/ ALLAN H. TOOLE,

/s/ E. GLENN HARMON,

WITHERSPOON, KELLEY,
DAVENPORT & TOOLE,
Attorneys for Plaintiffs.

[Endorsed]: Filed May 19, 1961.

[Title of District Court and Cause.]

Civil No. 4991

NOTICE OF APPEAL

Notice Is Hereby Given that Max J. Kuney, Sr., plaintiff above named, hereby appeals to the United

States Court of Appeals for the Ninth Circuit from the judgment of dismissal entered March 22, 1961, on granting defendant's motion for Judgment Notwithstanding the Verdict of the Jury, and from the Judgment Notwithstanding the Verdict of the Jury entered on the civil docket on April 25, 1961.

Dated this 17th day of May, 1961.

/s/ ALLAN H. TOOLE,

/s/ E. GLENN HARMON,

WITHERSPOON, KELLEY,
DAVENPORT & TOOLE,
Attorneys for Plaintiffs.

[Endorsed]: Filed May 19, 1961.

[Title of District Court and Cause.]

Civil No. 4992

NOTICE OF APPEAL

Notice Is Hereby Given that Olive R. Kuney, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment of dismissal entered March 22, 1961, on granting defendant's Motion for Judgment Notwithstanding the Verdict of the Jury, and from the Judgment Notwithstanding the Verdict of the Jury entered on the civil docket on April 25, 1961.

Dated this 17th day of May, 1961.

/s/ ALLAN H. TOOLE,

/s/ E. GLENN HARMON,

WITHERSPOON, KELLEY,
DAVENPORT & TOOLE.

[Endorsed]: Filed May 19, 1961.

[Title of District Court and Cause.]

Civil No. 4990

BOND FOR COSTS ON APPEAL

Know all men by these presents:

That we, Max J. Kuney, Jr. and Constance K. Kuney, Husband and Wife, the Plaintiffs above named as Principals and the General Insurance Company of America, a corporation organized under the laws of the State of Washington, and authorized to transact the business of surety in the State of Washington, as Surety, are held and firmly bound unto William E. Frank, the defendant above named in the just and full sum of Two Hundred Fifty and no/100 (\$250.00) Dollars, for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 17th day of May, A. D., 1961.

The Condition of This Obligation is Such, That,

Whereas, the above named Defendant on the 22nd day of March, A. D., 1961, in the above entitled action and court recovered judgment against the Plaintiffs above named for Judgment of Dismissal

And Whereas, the above named Principals have heretofore given due and proper notice that they appeal from said decision and judgment of said United States District Court, Western District of Washington, Northern Division to the Ninth Circuit Court of Appeals.

Now Therefore, if the said Principals, Max J. Kuney, Jr. and Constance K. Kuney, Husband and Wife shall pay to William E. Frank the Defendant above named, all costs and damages that may be awarded against him on the appeal if the appeal is dismissed or the judgment affirmed, or such costs as the appellate court may award if the judgment is modified, not exceeding the sum of Two Hundred Fifty and no/100 (\$250.00) Dollars then this obligation to be void, otherwise to remain in full force and effect.

/s/ MAX J. KUNEY, JR.,

/s/ CONSTANCE K. KUNEY.

[Seal] GENERAL INSURANCE COM-
 PANY OF AMERICA.

By /s/ THYRA NORTHLANDER,
 Attorney-in-Fact.

[Endorsed]: Filed May 19, 1961.

[Title of District Court and Cause.]

Civil No. 4991

BOND FOR COSTS ON APPEAL

Know all men by these presents:

That I, Max J. Kuney, Sr., the Plaintiff above named as Principal and the General Insurance Company of America, a corporation organized under the laws of the State of Washington, and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto William E. Frank, the defendant above named in the just and full sum of Two Hundred Fifty and no/100 (\$250.00) Dollars, for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 18th day of May, A. D., 1961.

The Condition of This Obligation is Such, That,

Whereas, the above-named Defendant on the 22nd day of March, A. D., 1961, in the above-entitled action and court recovered judgment against the Plaintiff above named for Judgment of Dismissal.

And Whereas, the above-named Principal has heretofore given due and proper notice that he appeals from said decision and judgment of said United States District Court, Western District of

Washington, Northern Division to the Ninth Circuit Court of Appeals.

Now Therefore, if the said Principal, Max J. Kuney, Sr., shall pay to William E. Frank the Defendant above named, all costs and damages that may be awarded against him on the appeal if the appeal is dismissed or the judgment affirmed, or such costs as the appellate court may award if the judgment is modified, not exceeding the sum of Two Hundred Fifty and No/100 (\$250.00) Dollars then this obligation to be void, otherwise to remain in full force and effect.

/s/ MAX J. KUNEY.

[Seal] GENERAL INSURANCE COMPANY OF AMERICA,

By /s/ THYRA NORTHLANDER,
Attorney-in-Fact.

[Endorsed]: Filed May 19, 1961.

[Title of District Court and Cause.]

Civil No. 4992

BOND FOR COSTS ON APPEAL

Know all men by these presents:

That I, Olive R. Kuney, the Plaintiff above named as Principal and the General Insurance Company of America, a corporation organized

under the laws of the State of Washington, and authorized to transact the business of surety in the State of Washington, as Surety, are held and firmly bound unto William E. Frank, the defendant above named, in the just and full sum of Two Hundred Fifty and no/100 (\$250.00) Dollars, for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 18th day of May, A. D., 1961.

The Condition of this Obligation is Such, That,

Whereas, the above-named Defendant on the 22nd day of March, A. D., 1961, in the above-entitled action and court recovered judgment against the Plaintiff above named for Judgment of Dismissal.

And Whereas, the above-named Principal has heretofore given due and proper notice that she appeals from said decision and judgment of said United States District Court, Western District of Washington, Northern Division to the Ninth Circuit Court of Appeals.

Now Therefore, if the said Principal, Olive R. Kuney shall pay to William E. Frank, the Defendant above named, all costs and damages that may be awarded against him on the appeal if the appeal is dismissed or the judgment affirmed, or such costs as the appellate court may award if the judgment is modified, not exceeding the sum of Two Hundred Fifty and No/100 Dollars (\$250.00) then this ob-

ligation to be void, otherwise to remain in full force and effect.

/s/ OLIVE R. KUNEY,

By /s/ MAX J. KUNEY.

[Seal] GENERAL INSURANCE COM-
PANY OF AMERICA,

By /s/ **THYRA NORTHLANDER,**
Attorney-in-Fact.

[Endorsed]: Filed May 19, 1961.

[Title of District Court and Cause.]

No. 4990, 4991 and 4992

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING APPEAL

It Is Hereby Ordered by this Honorable Court that Max J. Kuney, Jr., and Constance K. Kuney, husband and wife, Max J. Kuney, Sr., and Olive R. Kuney, Plaintiffs-Appellants, shall have, pursuant to Rule 73(g) of the Federal Rules of Civil Procedure, their time extended to August 17, 1961, for filing the record on appeal and docketing the appeal.

Done in Open Court this 23rd day of June, 1961.

/s/ GEO. H. BOLDT,
United States District Judge.

Presented by:

/s/ ALLEN A. BOWDEN,
One of the Attorneys for
Plaintiffs-Appellants.

Approved:

/s/ JOSEPH C. McKINNON,
Ass't. U. S. Attorney, One of the Attorneys for
Defendant-Appellee.

[Endorsed]: Filed June 27, 1961.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 4990

MAX J. KUNEY, JR., and CONSTANCE K.
KUNEY, Husband and Wife,
Plaintiffs,

vs.

WILLIAM E. FRANK, District Director of In-
ternal Revenue,
Defendant.

No. 4991

MAX J. KUNEY, SR.,
Plaintiff,

vs.

WILLIAM E. FRANK, District Director of In-
ternal Revenue,
Defendant.

No. 4992

OLIVE R. KUNEY,

Plaintiff,

vs.

WILLIAM E. FRANK, District Director of Internal Revenue,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Transcript of Proceedings had in the above-entitled and numbered cause in the above-entitled court before the Honorable George H. Boldt, United States District Judge, commencing on Monday, November 21, 1960, at the United States Courthouse, Seattle, Washington.

Appearances:

On behalf of the Plaintiffs:

MR. ALLAN TOOLE, and
MR. GLENN HARMON,
WITHERSPOON, KELLEY,
DAVENPORT & TOOLE,
Attorneys at Law.

On behalf of the Defendant:

MR. ARTHUR L. BIGGINS, and
MR. DALE E. ANDERSON,
Attorneys, Tax Division, Department
of Justice, Washington, D. C.

(Whereupon, on Monday, November 21, 1960, at the hour of 9:30 o'clock a.m., all counsel heretofore noted being present, the following proceedings were had, to wit:)

(Whereupon, a jury was duly empaneled.)

(Whereupon, the admitted facts of the pretrial order were read aloud by the Court to the jury.)

(Whereupon, opening statements of counsel were rendered.)

(Whereupon, a noon recess was taken.)

Afternoon Session

The Court: Every one is here. Call a witness, please.

Mr. Toole: The plaintiff will call Mr. Kuney.

MAX JEFFREY KUNEY, SR.

plaintiff herein, called as a witness on his own behalf, being first duly sworn, was examined and testified as follows:

The Clerk: Would you state your name?

The Witness: My full name is Max Jeffrey [3*] Kuney, Sr.

Direct Examination

By Mr. Toole:

Q. And where do you reside?

A. At 1268 Mercer Street, Seattle.

Q. When were you born, Mr. Kuney?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Max Jeffrey Kuney, Sr.)

A. August 12, 1894.

Q. Where was that?

A. On a farm out of—near Wasco, Oregon.

Q. Wasco, Oregon. What is your educational background, Mr. Kuney?

A. Well, I started to school when I was about nine. My mother taught me to read, and I went to high school in Salem, left school when I was fifteen years old and went to Alaska. Except for going back to high school for two years later and finishing, which I did do, why, that is my formal schooling.

Q. What kind of work, Mr. Kuney, were you engaged in after you got out of high school?

A. Well, I continued to do—I worked on the survey parties.

Q. Did you have any formal engineering training, experience? A. No.

Q. In your work?

A. But I became a civil engineer. [4]

Q. Could you speak up so that the jury can hear you?

A. I was a professional engineer for—except for a year when I was—became bookkeeper for a construction firm.

Q. What experience did you have in the general contracting business prior to 1939?

A. Well, I became—I went into the general contracting business actively in 1924, or shortly thereafter. In 1924 I went to work for a general contractor as a bookkeeper.

Q. What does a general contractor do?

(Testimony of Max Jeffrey Kuney, Sr.)

A. He contracts in general and takes a general contract, and that is just a separation from the subcontractor who usually takes a contract from a general contractor.

Q. Was most of this experience in roads and heavy construction, things of that sort?

A. Railroads entirely until 19—as a civil engineer always on railroads until 1919 and thereafter on highways, and at first as a contractor on railroad construction, Southern Pacific.

Q. When were you married to Lorraine Kuney?

A. In August, 1916, when I was twenty-two.

Q. Were there any children born of that marriage? A. Yes, Max Kuney, Jr.

Q. Any other children?

A. No others born of that marriage. [5]

Q. That was Lorraine Kuney? A. Yes.

Q. When were you separated from Lorraine Kuney? A. In about 1942, as I recall it.

Q. You married Olive Kuney. When was that?

A. In 1944.

Q. Were any children born of that marriage?

A. Yes, John in 1945.

Q. Any other children? A. No others.

Q. Directing your attention back to the year 1939, how old was your son, Max, Jr., at that time?

A. Twenty-one, I believe.

Q. Had he had any contracting experience prior to that time? A. No.

Q. What prompted you to consider taking him into business with you at that time?

(Testimony of Max Jeffrey Kuney, Sr.)

A. To make a family business.

Q. You were engaged in the general contracting business at that time as a sole proprietor?

A. With two special partners.

Q. Who were those two special partners?

A. They were—there were three special partners, M. F. Coons, Lloyd Reed, [6] R. T. McAndrews.

Q. Did Max Kuney, Jr., go into any—Strike that.

How did you take Max, Jr., into the business? What arrangement did you make with him?

A. The arrangement with him was that effective, I believe it was in 1940, he was to share any profits equally with me wherever they would be and whatever I get.

Q. Did he put any money into the business?

A. No, he had no money.

Q. Did you have an investment in the business at that time? A. Yes.

Q. And you agreed that you would share profits equally even though you were the only one who had an investment in the business?

A. That is right.

Q. What was the name of that partnership between you and your son?

A. Max J. Kuney Company, and the name has never changed.

Q. Max J. Kuney Company? A. Yes.

Q. What was the nature of your business from the period of 1939 to the end of 1951? Tell the jury

(Testimony of Max Jeffrey Kuney, Sr.)

generally what kind of work you and your partner Max, Jr., engaged in?

A. From 1939 to 1944 it was just in Spokane. In 1944 I came to Seattle and got very active and formed the Agutter Electric Company, the Kuney-Johnson Company, the Techler Aluminum Products. [7]

Q. What did Agutter Electric Company do?

A. They were electrical contractors.

Q. What does electrical contracting mean?

A. That means that they themselves did heavy industrial type of electrical work and electrical installations on larger buildings, not residences, and also at the beginning they were an old established firm, and they had quite a trade in just little things like putting in light bulbs and service calls, one hour, but that we stopped.

Q. Who was the other person with whom you were in partnership at Agutter Electric?

A. Well, he was an employee of the old firm. I took over the firm name and the man's name was Greene, C. S. Greene.

Q. Now, was C. S. Greene a partner of Max J. Kuney Company? A. Yes, he was.

Q. Or was there a subpartnership?

A. Well, as I stated, my original agreement with my son is that we would always share equally in whatever I did do. So when I say I formed a partnership, that means that Max, Jr., and I together formed the partnership with this man Greene, who would be the operating partner. We always fur-

(Testimony of Max Jeffrey Kuney, Sr.)

nished all of the money. Greene also had no capital investment. Neither did Johnson have any [8] capital investment. I never had a partner with a capital investment. To begin with——

Q. What was Kuney-Johnson Company?

A. That was the building contractor, and the type of work they did was always not residences, it was larger buildings such as the Public Safety Building.

Q. The Public Safety Building where?

A. In Seattle, and the Federal Reserve Bank.

Q. In Seattle? A. In Seattle.

Q. Who was the partner?

A. He was Lloyd Johnson, Lloyd W. Johnson.

Q. Is it or is it not correct to say that Max J. Kuney Company was one of the partners of Kuney-Johnson, and Lloyd Johnson was the other partner, is that it?

A. Yes, that would be correct to say. It would be equally correct to say that Max Kuney, Sr., and Jr., and Lloyd Johnson were, but we always considered the Max J. Kuney Company partnership as a pair.

Q. Max J. Kuney Company was the partner of Lloyd Johnson? A. Yes.

Q. And in the third business, Techler Aluminum Products? A. Yes.

Q. Would you tell the jury what kind of business that was?

A. That was a manufacturing business and also a sales [9] business. We made aluminum window

(Testimony of Max Jeffrey Kuney, Sr.)

sash and doors and store fronts, also for industrial type buildings principally here and elsewhere, in San Francisco, as far into the Pacific as Guam, and so on.

Q. Who was the other person interested in that particular venture?

A. Well, there again it was a special partner. His name was W. H. Page. But except for the special partner, this was the same ownership as Kuney-Johnson, that is, Max J. Kuney Company, meaning Junior and I again with Lloyd Johnson. Those were the proprietors of Techler Aluminum Products.

Q. Max J. Kuney Company was one of the partners, and Lloyd Johnson was the other at Techler Aluminum Company, is that correct?

A. Yes. And also another one which I noticed not mentioned on the chart was Aralco, and the meaning is "Architectural Aluminum Company." But we went under the name of Aralco. It operated in Seattle and San Francisco.

Q. Could you tell the jury in simple terms how, for example, the profit that Agutter owned were divided as to Mr. Greene and Max J. Kuney Company?

A. After its early organization they were divided equally, fifty-fifty, the same as with Lloyd Johnson. When there would be a special partner, he would receive a [10] distribution first, and the remainder would be divided fifty-fifty, equally, I mean.

(Testimony of Max Jeffrey Kuney, Sr.)

Q. But that is after the interest of persons who might be—Strike that.

A special partner—is it true or not true that a special partner is a person interested in a special part of the work?

A. He could be interested in only one phase of it. But in relation to Techler Aluminum and others like that, he would be a special partner for this reason, that he would not be interested in fixed assets. So that if he would leave at any time, and, of course, if he was not—if he ever became not an employee, he was no longer a partner. He could only be a partner as long as he was an employee. That was to facilitate settlement with him. There was nothing to consider, whatever. It was just always what the tax returns said that he was—that was always the basis of settlement.

Q. But after the special partners had received their share of the profits, you testified that the remaining profits are divided equally between Max J. Kuney Company and—

A. (Interposing): Yes.

Q. (Continuing): —operating partner in all of them? A. Yes.

Q. So that it is proper to say, then, that Max J. Kuney [11] Company shared half of the net profits of these subpartnerships you are talking about?

A. Yes, after the special partner got usually a minor interest.

(Testimony of Max Jeffrey Kuney, Sr.)

Q. What kind of work was Max J. Kuney Company doing at the end of 1951?

A. Its own operation was as a heavy construction contractor.

Q. What do you mean by heavy construction?

A. Meaning that he used heavy equipment to do grading, rock crushing, paving, principally on highways or on dams, not building construction.

Q. Mr. Kuney, do you recall approximately what the partnership of Max J. Kuney Company was worth on December 31 of 1951?

A. Well, yes, I know now it was—my capital interest was \$594,000, in round numbers. Max, Junior's, was \$485,000.

Q. In round figures? A. Yes.

Q. Mr. Kuney, what considerations have you ever given to making the transfer of any part of your interest in the partnership to any of—I am referring to the end of 1951—what consideration had you given to transferring part of your partnership interest to anyone else?

Q. Well, in 1951, the latter part of 1951, some time or another, I read in a report of the American Research Institute, it was just headlined, I noticed it at a [12] glance, I heard a great deal, and the headline said, "Family Partnerships Sanctified for Tax Purposes," and that had a meaning to me, and I read right down through it.

This article stated that Congress had finally legislated and established possibly the rule——

(Testimony of Max Jeffrey Kuney, Sr.)

The Court: You had better not recite it. It was just an article of that kind.

A. (Continuing): But at that time I noticed there was a couple of requirements, and I went right about it to attend to those.

Q. (By Mr. Toole): What step did you take to make that thought into a reality?

A. Well, I was familiar with everything except one thing, and I never had any experience with trusts. So I think right in a day or two I went down to the office of Mr. Tracy Griffin, who was then alive, and told him that I was planning on setting up a trust for John. He knew who John was, and I would like to see some trust agreements if he had one, possibly one he had made up, and another one if he had them, or could he get me one that had been made by some bank, and he did so in the course of a minute or two, and I took them out in the library and read them both at the same time, and then I went down through them, and they were both quite long, [13] and that was that, and I thought I knew what they were and I thought that was all right. Then I just in my mind——

Q. Who was Mr. Tracy Griffin?

A. I just reduced it to just a sentence to what my feeling of what a trust meant.

Q. Who was Mr. Tracy Griffin?

A. He was an attorney here at that time, sir.

Q. When did you make or come to the conclusion that you wished to make a gift?

A. Well, right then. I thought, "Well, this is

(Testimony of Max Jeffrey Kuney, Sr.)

all right. There is no difficulty here that can't be straightened around, no complications." I wanted to do it.

Q. Why did you want to do it?

A. Well, particularly so because at that time—I thought it was the thing that you could do. I was, of course, aware of troubles that others had had with family partnerships, and I wanted no part of it and had no part of it, but I noticed that, and I said, "Well, this is the thing for me to do," particularly so because of my age.

Q. Was there any motive besides tax considerations that prompted you to make that?

A. Most assuredly. I knew the tax considerations, but the real thing was this, that I was then 58 and I wanted to do the same for John that I had done for Max. But I didn't know whether I would be around.

Q. How old was Johnnie at that time?

A. Six—five.

Q. Did you or did you not have any thoughts that perhaps he would be ever interested in the business?

A. Well, I wanted, above all, that he would be identified particularly with Max as his half brother and would sort of be tied to him and grow up with him.

Q. If you wished to make a gift to Johnnie, couldn't you have given him something other than an interest in the partnership?

A. Most assuredly, but the interest in the part-

(Testimony of Max Jeffrey Kuney, Sr.)

nership was the important thing. It was the thing—not that he would ever have to do it, but with the hope that as he grew up, became a year or two older, that that would incline him to continue and carry on.

Q. Did you have any property from which the gift might have been made besides an interest in the partnership?

A. I never had anything except what was in the companies and don't today.

Q. Didn't you have any securities that you might have given to him?

A. I haven't ever had any securities, anything except what was in the company since 1927, and I don't have now. [15]

Q. You stated that you, if I am correct, that Mr. Tracy Griffin let you examine some forms of trust instruments?

A. Well, his secretary just gave them—that was the end of it. Mr. Griffin talked to me maybe a half a minute. That was my purpose. I wanted to read the trust agreement, and that is where I went to do it and saw what they were.

Q. Did you ever consider making a gift outright to six-year-old Johnnie?

A. Well, no, because, as I say, I then knew that one of the things you have to do, because the child was a minor, that there had to be a trust. Without a trust it was no—you don't have a family partnership for tax purposes, and that, naturally, of course, was the motive. But I knew there had to be

(Testimony of Max Jeffrey Kuney, Sr.)

a trust. There had to be a trust because he was a minor. That was the thing I was not familiar with, and I immediately went to find out about that.

Q. Do you know why the trust device was appropriate in this circumstance?

A. Well, it was required because he was a minor.

Q. Whom did you——

A. (Interposing): And it could be—yes, and as it was used actually, and as I see it, it could be used, it could form quite another purpose. It was something like a will, [16] you know, and you state what would be done in the future. It was quite a formal document, and I thought, “Well, that has been made and passed and done for a long time,” and I noticed that there was a lot of things in it that would be all right.

Very good. In fact, most everything I could imagine I found there in a couple of pages as far as what the trustee would do and could do.

Q. Whom did you consider appointing as trustee?

A. Well, I immediately considered that the trustee that I wanted would be Max, Jr.

Q. Why?

A. He is the other boy's brother, and that, as I say, would tie them together. That was one reason, and the second is that I had been watching Max, Jr., for eight years, and he had done quite well, and I considered that he was quite capable as a business man, at least, and he should handle those things, and also I noticed that he had a great

(Testimony of Max Jeffrey Kuney, Sr.)

affection for the younger boy, and I believe that he had the right ideas about what would be good for that boy and what would not be good for the boy under certain conditions.

I wouldn't—I knew of no one more suitable as a trustee, and I know of no one now.

Q. Did you consider appointing a bank or a trust company [17] as trustee? A. Not at all.

Q. Why not?

A. They know nothing of the child. They know nothing of my business. There is nothing personal to tie them to it. It was to completely defeat my whole purpose. It is a family partnership, and that it should be, and I could never take out of my mind the thought that that was—that there was a family partnership.

Q. At this time I would like to hand to the witness Exhibit 2, Plaintiffs' Exhibit 2.

(Whereupon, a document was handed to the witness by the Bailiff.)

Q. Mr. Kuney, would you identify Plaintiffs' Exhibit 2 for the benefit of the jury?

A. This is the trust agreement dated February 11, 1952, between Max J. Kuney, myself, and Max J. Kuney, Jr., and my son in which——

Q. Who was the grantor of that trust?

A. I am the grantor, and he is the trustee.

Q. Directing your attention to the last paragraph on Page 1, I wonder if you would read that paragraph to the jury?

(Testimony of Max Jeffrey Kuney, Sr.)

A. "It is agreed that from the capital account of Max J. Kuney, grantor, shall forthwith cause to be placed to [18] the credit of the trustee, \$100,000.00 under capital account captioned 'Max J. Kuney, Jr., trustee' on the firm books of the businesses of grantor, which said sum equals approximately twenty per cent of his interest in said businesses. The crediting of said amount to the account of the trustee shall constitute the paying over, assignment, transferring, and delivering to the trustee of said sum and the receipt of the same by the trustee."

It was there that the capital account was—capital interest was credited. There was the instruction to credit it to the books of account, to enter it and make it formal on the company books.

Q. Who prepared this instrument?

A. Your law firm, and the man that prepared it was Bill Witherspoon of Witherspoon, Kelley, Davenport & Toole of Spokane.

Q. He is my partner? A. That is right.

Q. And had you had conferences with Mr. Witherspoon regarding the terms and provisions of this instrument?

A. I have been in his office, but, as I said, I had already looked at the trust agreements and I had been in his office more than once; that is, before lately, but I don't know whether it was before or after this, but at [19] least I was in his office.

Q. Will you describe to the jury the provisions

(Testimony of Max Jeffrey Kuney, Sr.)

of the trust with respect to paying off the income and the principal for the benefit of Johnnie?

A. Well, yes. In my mind the important thing is that the trustee could, if he wished, hold the income from the beneficiary until the beneficiary was thirty years old. That was always in my mind, and it is now. I know when that date comes, that until thirty years old, why, he has the discretion to distribute income to the beneficiary, and otherwise the other provisions have meant no importance to me because I don't consider there is any action that I should take on them—important action until such time——

Q. By "other provisions" you don't or do you refer to provisions with respect of distribution of the principal of the trust? Perhaps you could describe to the jury the difference between income and principal as you conceive it?

A. Income is what you earn and the principal is what you have and hold. That is my explanation.

Q. What was the principal of the trust at the time it was created? A. \$100,000.

Q. Invested in what? [20]

A. In capital interest in the business.

Q. Now, what provisions are there in the trust with respect to distribution of that principal for the benefit of the beneficiary?

A. Distribution of the principal?

Q. Yes.

A. That is a rather far distant affair probably that I am not immediately concerned with. If John

(Testimony of Max Jeffrey Kuney, Sr.)

should die before he receives his trust estate and has no children, then it would go——

Mr. Biggins: If at any time leading questions will help, counsel, we will certainly not object.

Q. (By Mr. Toole): Thank you. Directing your attention to Section 3 of Article I on Page 2, isn't it true that at any time after John came to the age of 21 years——

A. (Interposing): Yes, sir.

Q. (Continuing): ——the principal could be distributed? A. That is true, yes.

Q. Was it mandatory that the principal be distributed?

A. No, not mandatory, nor is it mandatory that income be distributed.

Q. Until he reaches age thirty? A. Yes.

Q. After age thirty then what?

A. After thirty it must be distributed. [21]

Q. The income must be distributed?

A. Yes.

Q. Now, the principal eventually is distributed to whom if it is not distributed to Johnnie, and that is what you were testifying. If it was not distributed to Johnnie prior to Johnnie's death, what would happen to the principal?

A. If he has no children, it goes to the children of Max, Jr.

Q. If he did have children?

A. It would go to his children, and if Max, Jr., has no children—it doesn't go to me, that is all I know. It is sort of left up in the air there. If they don't have any children, I do notice that, I believe,

(Testimony of Max Jeffrey Kuney, Sr.)

I have always noticed that, just a rather remote possibility, if I were to survive John and his children, if he had any, and Max, Jr., and his children, then it doesn't say where it goes.

Q. But the important parts of the trust are that the income must be distributed after age thirty?

A. That is, yes.

Q. Now, why did you put that provision in there?

A. Well, it was put in there—I notice it was in there. I had seen it before. The impression that I got was that it was a good provision. I can see reasons why it would be a good provision. I am perfectly aware of that. [22]

Q. What reasons would those be?

A. One would be this, when this particular boy Jeff becomes twenty-one——

Q. (Interposing): We are talking about Johnnie?

A. When Johnnie becomes twenty-one, yes, then this would be up to Max, Jr., to take care of the situation. But that is his business. But I would rather say what I would do in connection with Jeff's affairs, if I may, as trustee.

Q. We are talking about the trust for the benefit of Johnnie. We will discuss trusts for the benefit of Jeff.

A. The trust for the benefit of John does contain that provision.

Q. Why did you provide in the trust that the income should not be required to be distributed to Johnnie until he was thirty years of age?

A. Well, for the very simple reason—it can be

(Testimony of Max Jeffrey Kuney, Sr.)

but it shouldn't be, and while I just never before, why, I even expressed this to Max, Jr., and I know I haven't to you, but I will do so now, and it is this, that at least I would hope—and maybe from now he will get the idea, that when John does become twenty-one, and I may be living or dead, Max, Jr., is the trustee. He can do, if he will, the same as I did by him. He can make this John a partner when he is twenty-one without any capital [23] interest whatsoever if he is able and can work. I did it before, and it worked, and also he can continue with him in this trust. While this is strictly taxes, why, it would make sort of a double entity out of the matter. John himself would be a taxpayer. John himself could be working for the company with quite a large salary as a taxpayer and at the same time earning quite an income over here on the other side as the beneficiary of a trust. Both of them are taxed at individual tax rates. The only difference is that one of them is a different exemption.

I was aware, of course, that that provision was the law then, at least, or—or allowable or had been and can be done that I found, and as I say, I have had numerous partners, none with capital interest. That has just been—except this case where the trust has a capital interest.

Q. Does the——

A. (Interposing): That is the only indication in all these years.

Q. Does the trust instrument require this capital— Strike that.

(Testimony of Max Jeffrey Kuney, Sr.)

Does the trust instrument require that the capital of this trust be invested in the partnership?

A. No. This trust instrument in short gives the trustee [24] powers, discretionary powers to do everything that I can imagine.

Q. Was it your intention that the investment be left in this partnership— Strike that.

Was it your intention to control Max, Jr., as trustee in how he should invest this property?

A. No. He is, you see, the trustee, and I would—he would outlive me normally, and so, therefore, he would naturally control this.

Q. Does the trust provide if in his discretion the investment should be removed from the family partnership and invested in other properties, that he is free to do it?

A. I am sure it does because it allows him to do everything imaginable, and it has one sentence——

Q. It does provide that, doesn't it?

A. Well, I am certain that it does, because—it says he can do these things, and besides that, he can do anything a natural man could do.

Q. When you made the trust instrument—correction— When you made the gift in trust did you prepare and file the gift tax return reflecting this gift that had been made?

A. They were prepared. All the things that we knew of that were necessary were done.

Q. Referring to Exhibits 7 and 8—directing your attention [25] to Exhibit No. 7, what is that?

(Testimony of Max Jeffrey Kuney, Sr.)

A. That is a federal gift tax return for the year 1952 reporting \$9,225 payable under this return.

Q. Was that gift tax return paid?

A. Yes, certainly.

Q. Does this gift tax return reflect the gift by you of the interest in the partnership?

A. Yes, it states exactly what it is on the back.

Q. Directing your attention to Exhibit No. 8, would you identify that for the jury?

A. That is a State of Washington gift tax return.

Q. What does that show?

A. That shows that due under this return is \$2,160.

Q. Of gift tax? A. Of gift tax.

Q. Was that gift tax paid? A. Yes.

Q. To the State of Washington?

A. To the State of Washington.

Q. Was a copy of this trust agreement furnished to the Internal Revenue Service when the gift tax return was filed—with the gift tax return?

A. It was furnished to them whenever it was required to be furnished. That I can't recall when you do these things.

Q. But a copy was furnished? [26]

A. Yes, I know that to be a fact. There is, at least, a letter written inclosing it, and certainly it was.

Q. And the Internal Revenue Service accepted the gift tax on this? A. Yes.

Q. They have never offered to refund it?

(Testimony of Max Jeffrey Kuney, Sr.)

A. I have heard nothing about that.

Q. At the same time it is true, is it not, that Max, Jr., created a trust for the benefit of these two children naming you as trustee?

A. Yes, sir. Well, I wanted to be trustee of that boy a while at least, and he did that.

Q. Directing your attention to Exhibit No. 1, would you describe that instrument to the jury?

A. Yes.

Q. Is that a trust agreement?

A. This is a trust agreement also.

Q. What is the date of that?

A. It is dated the same day as the other one.

Q. What date is that?

A. Eleven, February, 1952.

Q. Who was the grantor on that instrument?

A. The grantor is—are Junior and his wife.

Q. And who is the trustee?

A. I am the trustee. [27]

Q. That trust agreement, does it not, sets up two trusts, one for the benefit of your granddaughter Caroline?

A. True.

Q. And one for the benefit of your grandson Jeff?

A. Grandson Jeff.

Q. You call him “Jeff” so we don’t have a third “Max.”

A. Yes, Jeff.

Q. And what was given to you in trust to hold for the benefit of those children?

A. A \$100,000 capital interest.

Q. Whose capital interest was that?

A. A \$100,000 capital interest was theirs given to me in trust to hold for them in trust

(Testimony of Max Jeffrey Kuney, Sr.)

Q. Max gave part of his interest in the partnership? A. Oh, yes.

Q. To you in trust?

A. To me in trust for the benefit of the children.

Q. To hold for the benefit of the children?

A. Yes, sir.

Q. Were there any other beneficiaries of this trust?

A. Yes, sir. There was Max's mother and her parents.

Q. What provisions were stated in the trust with respect to distribution for the benefit of these beneficiaries? What power did you have to make distribution?

A. I was empowered to make distribution to them as I thought [28] they needed it.

Q. Distributions of income, is that correct?

A. Distributions of money, yes, income.

Q. Of income? A. Yes.

Q. Do you have the authority and power to make distributions to either the minor child, Jeff or Caroline, and to Lorraine do you mean? A. Yes.

Q. And to the Bently's.

A. That is true, yes.

Q. You have that power? A. I do.

Q. Isn't it true that the trust provides that after any distributions to Lorraine it was to be charged equally to Jeff's and Caroline's trust?

A. I am quite sure that is so, yes. I am quite sure that is so.

Q. And is it also not true that the distributions

(Testimony of Max Jeffrey Kuney, Sr.)

of capital follow the same pattern as the trust you previously discussed, that after age twenty-one you had the discretion to distribute?

A. Yes, that is so, I know. That is so, I know, yes, that I can at my discretion or any trustee can hold this income until these children are thirty years old, but he [29] don't have to do so. But he can do so.

Q. Who would be the trustee of this trust after you pass away?

A. I think Spokane Eastern, a bank, or—no, I guess—Max, Jr., becomes the trustee himself, and then the bank.

Q. Directing your attention to the top of page 11, it provides, does it not, that in the event Max Kuney——

A. (Interposing): Yes.

Q. (Continuing): ——that in the event you are unable to act as trustee, Max Kuney, Jr., would succeed as trustee?

A. Yes.

Q. If he does not wish to act, the Seattle-First National Bank then becomes trustee?

A. Yes, that is true, or in the event of his death, Seattle-First National Bank would become the trustee.

Q. Now, returning to the first trust which we were discussing, the trust which you created and appointed your son Max, Jr., trustee, you have testified that the trust instrument provided that there was to be a transfer of a capital interest in the partnership from you to Max, Jr., as trustee. Was that actually done on the books of account?

(Testimony of Max Jeffrey Kuney, Sr.)

A. Yes, that was done, yes.

Q. How was it carried out on the books of account with the [30] partnership?

A. Well, the capital account was set up in the name of the trustee, and there an entry is made, and it shows a \$100,000 there, and, of course, the appropriate account of a trust.

Q. The trust capital——

A. (Interposing): Who has given what to do? Pardon my confusion, but is this a gift to John?

Q. I am referring to the gift you made in trust to Max, Jr., for the benefit of John.

A. Well, yes, of course. That then would be charged to my personal account, and it would be set up as a credit in a capital account in the Kuney family partnership under the name of Max, Jr.—Max Kuney, Jr., trustee for the benefit.

Q. Was such an account actually set up on the books of the partnership? A. Yes.

Q. In the beginning of 1952 when this gift was made——

A. (Interposing): Well, I presume it was. It was set up the first.

Q. You have seen recently copy of the books of account, haven't you, where that account was actually created?

A. Yes, it was created. I didn't notice at the time. I am sure—yes, of course, it was done [31] in '52.

Q. Didn't all the financial statements show after that—the books show that trustee?

(Testimony of Max Jeffrey Kuney, Sr.)

A. Yes, they do show that in 1952.

Q. They have ever since the beginning of 1952?

A. Since 1952, I do know that. I have those always. But the books are in Spokane, and I am in Seattle.

Mr. Biggins: There is no dispute about that at all, your Honor. We will stipulate that, if it will help.

Q. (By Mr. Toole): Is it not true that the same thing as stipulated by Mr. Biggins was done with respect to John? A. Yes.

Q. With respect to the trust created by Max, Jr.?

A. Yes, that I do know. It is my duty to see that it was done, and I know it was done.

Q. Will you describe the nature of the partnership business as it was conducted by the partnership from the beginning of 1952 up to the formation of the corporation in the middle of 1953?

A. Yes.

Q. What kind of business were you engaged in?

A. There was no other Max J. Kuney Company, a partnership, the trust for partners. We did it all. There was no other entity. We were partners with all other firms [32] that I have mentioned under our own account operating in Seattle—in Spokane and elsewhere, and it was one entity, and the trusts were partners in that entity.

Q. And during this time were the subpartnerships with Techler Aluminum, Agutter Electric, and Kuney-Johnson Company going on as they had?

(Testimony of Max Jeffrey Kuney, Sr.)

A. Yes.

Q. In May of 1953 you determined to form a corporation, didn't you? A. Yes, then I did.

Q. Why did you determine to form a corporation?

A. That was because of two men, one in particular who was a general superintendent that had been with the business since—for many years and had accumulated \$86,000 or so, and we wanted to give him an interest and make him a real interest. He is a young man also.

Q. What is his name?

A. His name was Wigginton. It was formed for that principal business purpose.

Q. Who were the incorporators of the corporation?

A. Max and I and this fellow Peterson, who was an office manager.

Q. What name did the corporation have?

A. Max J. Kuney Company.

Q. Who owned the shares—to whom were the shares of [33] Max J. Kuney Company, a corporation, issued?

A. They were first issued to—the old Max J. Kuney Company, that was a partnership which—

Q. (Interposing): To the partners?

A. Yes, Max, Jr., and I and the trusts.

Q. What did the partnership transfer to the corporation at that time in consideration of those shares? A. Pardon me?

Q. What went into the corporation?

(Testimony of Max Jeffrey Kuney, Sr.)

A. \$400,000.

Q. Of cash? A. Well, credits.

Q. Was it accounting business and work in process and that type of thing that were turned over to the corporation as well as cash?

A. Well, they would naturally be fractionally interested, but when I make an entry of that kind, you just merely—you set up a corporation here, and there is \$400,000 capital in the thing.

Q. I am distinguishing what was left between the corporation and the partnership. What was left in the partnership at the time of that organization?

A. Machinery, equipment, land, buildings, fixed assets.

Q. What went over to the corporation?

A. Everything else. [34]

Q. What is "everything else"?

A. Everything else, all assets, all liabilities, everything else.

Q. That included work in process, construction, cash in the bank?

A. Everything, everything, but there was a little note, as I recall it——

Q. There was a minor matter?

A. That became a fixed asset that was going to—we were going to repossess the thing, and we got it repossessed a few days after, so it was a fixed asset, but it was a note.

Q. Why did you determine to leave the fixed assets in the partnership?

A. Well, the operation by this man who I men-

(Testimony of Max Jeffrey Kuney, Sr.)

tioned who had become in the corporation is a different thing and a different responsibility than the mere ownership of fixed assets which children might be able to handle, but not the actual going out and building of buildings and roads, and et cetera. Furthermore, the man had \$86,000, and I wanted him to have a 20 per cent interest, and you can't have it with too big a corporation. So it was started at \$400,000, and when he came in it became \$500,000, and that is it. There is no room for anything else in there, you see. It would be a little [35] corporation so he could have a 20 per cent interest. If he had to have a 20 per cent interest in everything, he has no money like that.

Q. From that time forward what kind of business did the partnership engage in?

A. From that time they owned fixed assets.

Q. What did they do with the fixed assets?

A. They rented them to the corporation, that is, the user. The corporation can do it, subrent, and it does all the things it is to do. The partnership owns fixed assets, that is all, and it has continued right up to now.

Q. It is true——

A. (Interposing): It might change that now, however.

Q. It received rental income from the corporation for the use of fixed assets? A. Yes.

Q. Has that business continued from then to the present day? A. Right now, yes.

(Testimony of Max Jeffrey Kuney, Sr.)

Q. At the present time the corporation is renting the fixed assets from the partnership?

A. Yes.

Q. Directing your attention to the last part of 1953 and 1954, how would rent be determined between the corporation and the partnership? [36]

A. Well, it was determined by Junior—by some formula he got out of an ADE book.

Q. What is an ADE book?

A. American—I don't know.

Q. American Equipment Dealer?

A. Yes, AED, American Equipment Dealers. I am familiar with this because I know what was done and changed. But finally the income that went there was computed by Mr. Carney for all those years.

Q. Who is Mr. Carney?

A. He is the income tax man. It is as shown in his report. He changed everything a little bit. It didn't amount to anything, I only bought one per cent, \$4,200, such a matter, and that was it, and we accepted that.

Q. In other words, the amount was ultimately approved and agreed upon between you and the Internal Revenue Service?

A. Yes, it was, as I say, less than one per cent change, but an entirely different method, I might say, but no change. We have accepted that and no question. Then we changed our method because there would be no more change, we hoped.

Q. With respect to the earnings of Max J.

(Testimony of Max Jeffrey Kuney, Sr.)

Kuney Company, the partnership, how were the profits earned by this partnership divided?

A. They can only be divided one way, that [37] is that.

Q. What way is that?

A. Well, first you must have reasonable salaries for the operating partners. I don't know what that might be.

Q. Who are the operating partners?

A. That would be Max, Jr., and me.

Q. Why do you call yourselves operating partners?

A. We are adults as distinguished from the children and the trustees who do nothing.

Q. While we are discussing the salaries, how much salary was paid to you by the partnership in 1952, do you recall?

A. 1952, it was quite a bit higher than it has been since, and I recall it was \$25,000.

Q. And that was because in 1952 the partnership was engaged in a complete general contracting?

A. Yes, that is true. And for a part of the time in 1953 it would be so. I would think that the salary for '53 would be somewhere between what it was for '52 and then '54, scarcely nothing.

Q. Isn't it true they paid \$10,000 salary in 1953 to you?

A. Well, if they did, I would say that that was about right. I don't recall.

The Court: Well, it is so stipulated, isn't it?

Mr. Biggins: That is correct. [38]

(Testimony of Max Jeffrey Kuney, Sr.)

The Court: All right.

A. I would think so.

Q. (By Mr. Toole): \$5,000 was paid in 1954?

A. Yes, that is five.

Q. And the reason for the decline was the change in the business?

A. Change in the things that we had left to do.

Q. From an operating business?

A. Just merely ownership of equipment. Five thousand dollars, I would say, is a nominal sum, and that could be one thousand as well.

Q. All right. Now, after these profits were—after these salaries were deducted from the profits of the partnership, how were the remaining profits divided?

A. That simply is a matter of arithmetic. You compute the proportion of the trust's income which it bears to the other partners' income, and it is a percentage run out through the machine, you run it out, and that is how it is. It can only be that way.

Q. Can you describe to the jury the principle or the—well, your agreement with respect to how this profit was divided, and in that connection I hand you Exhibits 24 and 25.

Exhibit 24, would you identify that to the jury?

A. Yes, this is an agreement dated the 11th of February, [39] 1952, which, incidentally, is the same date as the trust signed by me and also signed by Max, Jr., as trustee for the benefit of John, my son, by which, considering this now, I am a partner, he is a partner, and here is an agreement be-

(Testimony of Max Jeffrey Kuney, Sr.)

tween the two partners that they are to do this in relation to this income as is required to be done anyway. It just so states, which is well to state because there is no other place where that is stated.

It says, "The undersigned hereby agree that effective January 1, 1952, total Max J. Kuney income shall be distributed annually between Max J. Kuney and trust dated February 11, 1952, for benefit of John R. Kuney, as provided by the rules of law then effective for family partnerships and in conformity with the provisions of said trust."

In other words, this could last for thirty years, as I say. Laws could change, the agreement doesn't change. It is as provided, and it is as is stated, there is one last place there, the amount of salary which first must be deducted as a reasonable amount, and that is the thing that we can put down, what we think is reasonable, a reasonable amount. But someone else can come along and there can be a difference. It is a thing that has to be agreed. You can't state it. I have always had an idea I couldn't state a thing when it was some other [40] person's authority to change the thing. So I tried to make the agreement complete and completely fulfill not only now but forever this agreement which was made in 1952. It fits today.

Q. And in your opinion, referring to that reasonableness, were these salaries paid to you reasonable, in your opinion?

A. It was in our mind, as we set them down.

(Testimony of Max Jeffrey Kuney, Sr.)

Q. Are you aware now that the government is saying they were too low?

A. Well, I don't know that—yes, you told me that.

Q. I told you the government raised that issue, have I not?

A. Yes, too low. I am not aware of which years.

Q. Did the partnership of Max J. Kuney Company file income tax returns from 1952 on?

A. Yes, I know that they did. Yes, they did.

The Court: It is stipulated. That is all stipulated to. Let us not unnecessarily go over stipulated facts. Let us speed this thing along.

Mr. Toole: Those partnership returns are Exhibits 9 to 13. I think we have them all in one group.

Mr. Biggins: There are two copies of the income tax returns for the years for the tax [41] reported that was paid.

The Court: Yes, that is all by stipulation.

Q. (By Mr. Toole): I will ask one question with respect of all the tax returns.

All of those income tax returns disclose the fact that the trust partners——

A. (Interposing): That is right.

Q. And they show each trust as receiving his share of the income as well as each adult partner?

A. They certainly do, yes.

Q. And the balance sheets on those income tax returns show the trust as one of the partners owning——

(Testimony of Max Jeffrey Kuney, Sr.)

A. (Interposing): That I wouldn't know unless I looked.

The Court: Well, if you know it to be a fact, say so, and let us get on with it.

Mr. Toole: It is a fact.

Q. (By Mr. Toole): Were financial statements prepared by the partnership, and I direct your attention to Exhibits 30 and 32.

Mr. Biggins: We are prepared to stipulate, your Honor, they are true copies of financial statements prepared, I believe, by Max J. Kuney, Sr., and so certified to by Mr. Bowen.

The Court: That is in the record. Go ahead.

Q. (By Mr. Toole): Those financial statements disclose the [42] existence of the trust, do they not?

A. They do.

Q. And the capital interest of the trust?

A. They do.

Q. And they show the share of the income of the trust?

A. No, they do not, not on the financial statement. They show the capital interest, but they wouldn't—obviously wouldn't show the share of the income.

Mr. Biggins: It is stipulated that the computation of the amount of difference——

Mr. Toole (Interposing): I simply want——

The Court (Interposing): Wait just a moment, we can't both talk at once.

Mr. Biggins: I would be happy to stipulate with Mr. Toole that by subtracting the difference in the

(Testimony of Max Jeffrey Kuney, Sr.)

amount reported on the capital accounts for the several years you could compute without——

The Court (Interposing): It is not set out as such?

Mr. Biggins: It can be computed.

The Court: I understand, but it is not set out as a separate item, but it could readily be computed from the financial statement?

Mr. Biggins: Yes.

The Court: Do you understand that, ladies [43] and gentlemen?

(Whereupon, there was an affirmative response from the jury.)

The Court: All right. Go ahead.

Q. (By Mr. Toole): To whom were copies of these financial statements furnished in this form of the computation that is disclosed?

A. Principally the one bank. We have always done business with that one and only bank and the only bank we ever borrowed money from, that is the Spokane Eastern of the Seattle-First National.

Q. Were financial statements furnished to them from 1952 on? A. Always and prior.

Q. Did you furnish a copy of the trust instruments to the Seattle-First National Bank?

A. I don't know.

Q. The evidence later will show that it was true.

A. It is also true they were furnished in full, complete form, to the surety companies, and we have

(Testimony of Max Jeffrey Kuney, Sr.)

only done business with one surety company. Those are the total and only two people who ever have been creditors of our firm.

Q. Didn't you owe money to any other creditors besides the bank? [44]

A. This firm has never owed a penny of money except current bills since it started. We are one of the only firms that has paid cash for equipment always. We have only had one creditor. We owed money, it was owed to the bank. There was never anybody else.

Q. Borrowings from the Seattle-First National Bank have been substantial?

A. Well, sometimes they were, yes.

Q. Now, referring to the trustee created by Max, Jr., of which you are the trustee——

A. (Interposing): Yes, sir.

Q. (Continuing): ——you filed income tax returns, which are here in evidence, Exhibits 17 through 22?

A. Yes.

Q. As trustee? A. I know I did.

The Court: It is stipulated.

Q. (By Mr. Toole): Income tax returns have been paid as shown by those returns?

A. They have.

The Court: That has all been stipulated to, Mr. Toole.

Mr. Toole: That is right.

Q. (By Mr. Toole): And a trust copy of the trust agreement was furnished to the Revenue Serv-

(Testimony of Max Jeffrey Kuney, Sr.)

ice when you first [45] filed those income tax returns?

A. Yes, that is required. I am sure it was done.

Q. Now, referring to the income earned by you as a trustee or rather the trustee's share of this partnership income, did you make any distributions of this trust—strike that.

As stipulated, you made payments in cash of income of this trust to Lorraine Kuney?

A. I directed that it be done.

Q. And to the bank? A. I did.

Q. Why did you determine to make distributions of income to them?

A. Well, that came to my attention in a visit with his mother.

Q. Were they in need? A. Yes.

Q. What was their health situation at the time?

A. Very ill.

Q. They were very ill? A. Yes.

Q. How old were they?

A. The grandparents were 77 and 82. But his mother was ill.

Q. Did Max Kuney suggest that you make these distributions?

A. He was certainly willing that the suggestion did come [46] from me, and it came. She wanted to sell her property. I knew she shouldn't, I told her she shouldn't.

Q. Your relations with Lorraine Kuney were cordial? A. Very friendly.

(Testimony of Max Jeffrey Kuney, Sr.)

Q. At that time did you make any distribution—strike that.

You did make a distribution of the trust income to Jeff and to Caroline? A. Yes.

Q. How was that distribution made?

A. In the same manner as I have described, the salary taken off——

Q. No, you misunderstood the question.

From the income earned by the trust, you as trustee made distributions of 1952 income?

A. Correct. Yes, I do recall distribution to their personal accounts one year. That was done one year, yes. At my direction it was done in the year 1952 and not thereafter.

Q. What was the significance of that distribution?

A. That was to be a special thing that could be used especially for their education when the time comes.

Q. How was it distributed? Was cash distributed to them? A. No; credit.

Q. Credit, what do you mean by that? [47]

A. Well, another account would be set up, and it was distinguished from the account in trust. That account would be named and become the liability of the corporation, and it just states there their name, no trust in connection with it, Max J. Kuney, III, personal account, and in that would be a credit. It is a liability of the corporation.

Q. It is a liability of the corporation to him?

A. By the corporation to him.

(Testimony of Max Jeffrey Kuney, Sr.)

Q. To the children? A. To that child, yes.

Q. One to Jeff and one to Caroline?

A. That is true.

Q. Has the corporation paid interest on those accounts? A. At all times, yes.

Q. Until the present time it still is?

A. That is right.

Q. During the period of your administration of this trust did you leave all of the property or capital of the trust invested in this partnership, or did you——

A. (Interposing): No, there came a——

Q. (Continuing): ——did you invest part in anything else?

A. There came a time in some year in the past when the trustee—the trust had more than enough money to own all the fixed assets. So then when that occurred, they [48] became a surplus over and above what they needed to have to own the fixed assets, and that is available for investment in fixed assets or otherwise, and when that occurs, that sets there in the corporation and it draws interest. But you see, there is a considerable trading done in these fixed assets.

For example, on the 10th of August of this year we sold a \$230,000 building, it is something like that. There is over a million dollars worth of—much more than that in the original cost. It fluctuates.

Q. Has any of the property been taken out of the Kuney family enterprises and invested elsewhere? A. Never.

(Testimony of Max Jeffrey Kuney, Sr.)

Q. Why not?

A. We never do that. In the first place that is not the plan. In the second place, I know of no place that it will produce that income. In the third place, I do know, I believe, something about the construction business. Why should I put it in somebody else's business and in a piece of paper?

Q. Have you ever considered drawing any part of the trust investment out of the family?

A. I suppose. You see—sure, I considered and rejected it. You consider it and reject it. But it pays well and is safe. [49]

Q. How has that investment gone? Have you the figures at your disposal showing what the trusts are or were under your administration?

A. Yes, I know how they have grown.

Q. What have these trusts increased in value?

A. They have grown about as expected, maybe a little better. In other words, 15 per cent interest compounded after taxes. But the one, for example, for Jeff, he starts with \$50,000, and he now has \$109,000 after taxes and also \$27,000 in his personal account, a total of \$131,000 all springing from the same fifty thousand dollars. Caroline is the same.

Q. Did the formation of the corporation in any way reduce the share of profit earned by the trust?

A. Well, as it turned out, as a matter of fact, it happened to be beneficial to them, but we didn't exactly foresee it. It happens that the corporation had a bad year in 1959, but that certainly wasn't anticipated. As it turned out, why, the trust invest-

(Testimony of Max Jeffrey Kuney, Sr.)

ment back there in '53, when it was, now that has turned out to be very good.

Q. Are you as trustee free to withdraw this investment from the partnership and these family enterprises at any time you feel there is a better place for the money to be invested?

A. That is my understanding. I am free to withdraw my [50] decision, yes, sir.

Q. Why didn't you make any other distributions to Jeff or Caroline, or why didn't you pay any of the income out to Jeff or Caroline through these years?

A. It is sufficient as it was.

Q. Did they need any money?

A. They have never needed it, but they could. They are getting to the age that they could.

Q. But during the years involved here, they didn't need the funds?

A. Well, they got it from their mother and father.

Q. Their mother and father were adequately supporting them?

A. Yes.

Q. And particularly addressing yourself to 1954, were you instructed that any time by Max Jr., as to how you were to—as to whether or not you were to make any distributions of income from this trust? Were you instructed by Max, Jr., as to whether or not to make distributions of income?

A. Out of his trust?

Q. No, of the trust of which you are trustee.

A. Well, as it happened, it came—I, as trustee, instructed him in this particular case, because, well,

(Testimony of Max Jeffrey Kuney, Sr.)

I am not willing—because I presume I was the one that knew about this need in the family, and so forth. [51] And I did do that. I realized that when distributions—that I tell him what to do with that trust of his, direct him, and when it is a matter that is involved when you pay money to someone and how to handle it on the books, I would put that in writing because there is no misunderstanding, so I do that.

Q. Do you mean that Max, Jr., was in Spokane with a bank account?

A. Yes. I just merely wrote Max, Jr., a letter—a memo that he would understand, of course, that he was to instruct his bookkeeper to actually carry on this thing of writing a check and doing the thing.

Q. But at any time did Max, Jr., instruct you or tell you how to make any dispositions of the income of the trust that he created and of which you were the trustee?

A. No, there is never any occasion. He never, that I can recall, had anything to say about that because—with the exception of this Bently and his mother's distribution, and the other distributions are really just automatic. There is only one decision to make, "What is the reasonable salary," then it is a computation by arithmetic, and there has been no reason for even a discussion about what to do about that.

Q. Would you consider yourself bound by instructions by Max, Jr., as to how you were to act as a trustee? [52]

(Testimony of Max Jeffrey Kuney, Sr.)

A. Well, no, I understand it is the reverse.

Q. Do you consider that you are the only——

A. (Interposing): I am a trustee.

Q. And you use your own judgment?

A. I am the one that is in charge of that trust. That I am very aware of. Sometimes it gets confused. I can only think it is for the children I am their trustee. Now, it is for the benefit of the children, I am their trustee, and I have charge of it. I have the control of it as trustee. That is my duty to do, and that is the way I understand it, and the same as to him.

Q. You don't consider yourself bound by any suggestions he might make? That is, bound by suggestions he might make regarding the distribution?

A. I would certainly listen to him. I am not bound. As a matter of fact, by the same token he is not bound, as I understand.

Q. I want to explore that with respect to the trust you created of which he is the trustee.

A. He is the trustee.

Q. Which he is the trustee of? A. Yes.

Q. For the benefit of your son Johnnie?

A. Yes.

Q. Do you control his actions now as to how he is to handle [53] that?

A. No, not at all. If there is nothing—the things that he will do of importance there will be done, I presume, after my death. He controls that in the same way, but it is a little simpler in this respect, there were no other beneficiaries. There absolutely

(Testimony of Max Jeffrey Kuney, Sr.)

hasn't been anything to do about that. It has been in existence all these years except a decision once that we will invest it in fixed assets. There is now about to come up another decision, but that has no part here. But we are going to discuss the changing of those investments.

Q. In other words, for some time you have been wearing two hats in the administration of the partnership, is that one way to think of it, a trustee?

A. If you want to say so, I am a corporation, I am a partnership, I am used to that thing.

Q. You are accustomed to acting in more than one capacity in business relations?

A. I probably have a great many partnerships, yes.

Q. Do you find it difficult in your own mind to divorce your responsibilities as a trustee to Caroline and Jeff when you are making these business decisions?

A. No. First, I recognize they are my grandchildren. There is that feeling that is present. That is a human thing, I know that, and I want to take care of those [54] grandchildren whether I am trustee or whatever you call it, call it a grandfather. Then I am a trustee, another hat, that is business only. That is your control of some investments how they do them and later things.

(Whereupon, there was a brief pause.)

The Court: Let us speed this along, if we can, please.

(Testimony of Max Jeffrey Kuney, Sr.)

Mr. Toole: I think that will be all, your Honor.

The Court: We will take the recess before the cross-examination.

(Whereupon, a short recess was taken.)

The Court: Cross-examine, please.

Cross-Examination

By Mr. Biggins:

Q. May it please the Court, Mr. Kuney, sir, I understood you to say, Mr. Kuney, that some time around the winter of 1951 you read an article of the American Institute of Research about family partnerships? A. Research Institute of America.

Q. Excuse me.

A. It was the Research Institute of America, I believe it is.

Q. That is the correction I desire to give, Mr. Kuney, [55] "RIA." Research Institute of America. A. I believe so, yes.

Q. And that publication, Mr. Kuney, is a tax publication, is it not? It is not a business publication, it is a tax-saving publication, isn't that correct? A. That is correct.

Q. And on your occasion of your reading that tax publication, I believe, sir, at that time you were in the ninety per cent tax bracket? There is no denying that either, is there?

A. I believe that is a fact that that year I came in that bracket.

Q. And having read, and I believe you said,

(Testimony of Max Jeffrey Kuney, Sr.)

somewhat understood that tax article, you then went to who? I didn't get the name?

A. First I went to the office of Mr. Tracy Griffin.

Q. And is he an attorney or an accountant?

A. No, he was a lawyer. He has since died.

Q. In Spokane or Seattle?

A. In Seattle, sir.

Q. And in that office, I believe, sir, you read over a great number of trust instruments which he let you examine?

A. Two only.

Q. Two only? [56]

A. Yes.

Q. Which you examined, I take it, sir, with some care?

A. Yes, I was able to read them quite rapidly.

Q. It was after that that you went over to Spokane to Mr. Witherspoon's office and discussed the trust problem with him?

A. Yes, it was after that. That was the first thing I did.

Q. And you had more than one conference with Mr. Witherspoon about the trust?

A. I believe it was only one conference, and at that time he made the draft of a trust which stated that it was a rough draft, and it was read, approved, a final draft was made and signed. I believe that is the sequence.

Q. And signed, I believe, on February 11, 1952, in Mr. Witherspoon's office?

A. My copy was signed in Seattle, sent to me in Seattle to sign. I signed it in Seattle. I am quite

(Testimony of Max Jeffrey Kuney, Sr.)

sure I signed it in Seattle and returned it by mail. I may be mistaken.

Q. But it was signed on February 11?

A. Yes, that is the date.

Q. Now, in reading that article in the RIA, the tax magazine, you do recall that that article said in creating a family partnership you must be very careful of the partnership agreement entered into? Do you recall that? [57]

A. No, I don't recall that in this particular article.

Q. They did discuss the partnership agreement?

A. Not in that article.

Q. You don't recall it?

A. Well, it was not in that article. I have the article.

Q. You have it?

A. In my office, yes. This book, incidentally, contained other things. I have kept the book. I often refer to it.

Q. Regarding other things about taxes?

A. Yes, and also tax tables that were necessary things to use.

Q. Now, I believe you did mention a partnership with these other gentlemen like Mr. Johnson, didn't you?

A. Yes, I did.

Q. And we did have written partnership agreements with Mr. Johnson?

A. Yes, there is a written agreement concerning Mr. Johnson.

Q. And with Mr. Greene?

A. Yes.

(Testimony of Max Jeffrey Kuney, Sr.)

Q. And you will recall, of course, that you also had a written partnership agreement with your own son, Max, Jr.? A. Yes.

Q. All right. And included in that partnership agreement you had with your son, that is the period '39 through [58] '52, that date is correct, isn't it, Mr. Kuney? A. I believe so.

Q. And included in that agreement you had with your son was the understanding, "The father shall continue as the nominal head of the firm with final decision on all matters pertaining to the firm, but it is contemplated that the father will gradually retire from active management with decreasing duties and responsibilities and that the son will take over increasing duties and responsibilities, but always with the father continuing in full authority with final decision on all matters pertaining to the firm."

You do remember something like that?

A. I remember that.

Mr. Toole: What is that instrument, your Honor?

(Whereupon, a document was handed to Mr. Toole by Mr. Biggins.)

Mr. Toole: I am totally unfamiliar with this instrument.

The Court: That is unfortunate. Let counsel follow it if he wishes. But the cross-examination must not be interrupted, of course.

Go ahead.

Q. (By Mr. Biggins): We have established, I

(Testimony of Max Jeffrey Kuney, Sr.)

believe, [59] Mr. Kuney, we did have a written agreement with your son?

A. I know that agreement, I wrote it.

Q. And also in that agreement you understood, "The son shall give all his working time to the firm's business, diligently pursue knowledge of the same in his spare time, and at all times actively superintend and manage its affairs. It is contemplated that by the very nature of the firm's business the responsibilities of the son will be heavy and that his duties will involve a great amount of traveling with the hardships of a transient family life. This is fully understood between the parties hereto and the transfer of these duties and incident hardships from father to son is the very essence of this agreement."

You do remember that?

A. I am sure that it was in the——

The Court: The point is, you do recall that was provided in the agreement with your son?

The Witness: Definitely.

Q. (By Mr. Biggins): Also do you remember the understanding, "It being considered that under the duty contemplated for each partner the father will furnish experience beyond that of the son while the son will perform work beyond that of the father, therefore, their respective [60] salaries and shares in the firm's profits shall be equal, provided, however, that before any profits are divided the father shall receive interest at the rate of three per cent per annum on the amount if his capital account exceeds the son's capital account, except that this pro-

(Testimony of Max Jeffrey Kuney, Sr.)

vision shall not operate until hereafter there shall have been the sum of \$50,000 profits first divided equally between father and son."

Do you remember that, too?

A. Yes, I remember that.

Q. As well as the other provisions discussed and understood and executed by you?

A. I remember that, and the purpose of it and its meaning very well. That was a very important partnership agreement in my life, the most important.

The Court: Well, all Mr. Biggins is getting at now, Mr. Kuney, is the fact that you did have a detailed partnership agreement between you and your son in which all of these matters that he has referred to, as well as others, were spelled out in detail?

The Witness: That is true.

The Court: All right. Go ahead.

Q. (By Mr. Biggins): If you will, Mr. Kuney, I have asked Mr. Grant, the Bailiff, to make available to you a [61] number of exhibits, Exhibits 1 and 2, which I believe you will recognize as the two trust agreements. A. Yes.

Q. Exhibits 24 and 25, the agreements which you spoke about on direct examination a few moments ago? A. Yes.

Q. And in addition to that the rental agreement, the Dun and Bradstreet reports, and I believe, if you will look at the bottom of those made available,

(Testimony of Max Jeffrey Kuney, Sr.)

the corporate units, the stock book, Defendant's Exhibit Q—do you also have that there, Mr. Kuney?

A. Yes.

Q. Now, going through these, if I may, sir, in chronological order as much as I can, could we take that first trust instrument. That is the trust of which you were the trustee, Exhibit 1, is it not, Plaintiffs' Exhibit 1?

A. Yes.

Q. And looking at that, as I read some parts very rapidly—

The Court: Not too rapidly, we must all hear you. Tell him the page and line.

Q. (By Mr. Biggins): That was the trust agreement, I take it, Mr. Kuney, that you executed February 11 in Seattle, Washington, received by mail and sent right back?

A. I said that I was not certain of that. I believe so.

Q. Whatever your recollection is, we understand it is a [62] long time ago.

A. That is true.

Q. But you do remember signing it?

A. I did sign it.

Q. And this is the trust that you considered in draft and discussed in conference with Mr. Witherpoon and then had a revised draft executed? That is that instrument?

A. That is the instrument.

Q. Now the first page, if I may somewhat read rapidly as you follow me, I am reading, Mr. Kuney,

“Whereas, Max J. Kuney, Jr., is in the general contracting business, carrying on such business in

(Testimony of Max Jeffrey Kuney, Sr.)

partnership with others under the firm names of Max J. Kuney Company, Kuney-Johnson Company, Agutter Electric Company, and Techler Aluminum Products; and

Whereas, it is the intention of the grantors to make a gift in trust for the benefit of their minor children and others of a percentage of their interest in each of said partnership businesses; and

Whereas, it is the intention of the grantors that the sum of such percentages so to be given by them in trust for the benefit of their minor children and others shall equal \$100,000.00 in value.” [63]

You have seen that language there?

A. Yes.

Q. And then we set up that \$100,000 under the capital account, as you described it, and may I turn now, if I may, sir, to Section 1, Article II, on Page 2?

A. Yes.

Q. We are talking there, I believe, about the powers of the trustee?

A. Yes.

Q. Section 1:

“The trustee shall divide the trust estate into two equal funds, one for the benefit of Max Jeffrey Kuney, III, a son of grantor, and one for the benefit of Caroline Ireland Kuney, daughter of the grantor. Each of said funds shall be deemed to be and shall be administered as a separate trust.

The trustee shall hold, manage, invest, and reinvest the funds of the trust estate, shall receive the income therefrom, and shall, after paying the reasonable and proper expenses of the trust, pay and

(Testimony of Max Jeffrey Kuney, Sr.)

distribute the principal thereof, and the income therefrom, as follows:

Section 1. The trustee shall have the right in his sole and uncontrolled discretion to pay to [64] Lorraine B. Kuney, mother of the grantor, Max J. Kuney, Jr., to Clayton H. Bently, grandfather of the grantor, Max J. Kuney, Jr., and to Mabel C. Bently, grandmother of the grantor, Max J. Kuney, Jr., or to any of them, such portion or portions of the income of the trust estate as the trustee may deem necessary to provide for the support, health, maintenance, welfare, and enjoyment of such person or persons, due regard being given by the trustee to the other sources of income of such persons."

You do see that in that instrument?

A. That is there, yes.

Q. And it is clear in your mind that it is your discretion and nobody else's——

A. (Interposing): It is my discretion, yes.

Q. Your sole and uncontrolled discretion, you understood that? A. I understand that.

Q. And in that same article on the next page it was further provided, you see at the last sentence of Section 2:

"The trustee's determination as to whether or not payments shall be made to the persons named in this section and the amount of such payments shall not be subject to judicial review." [65]

You understood that as you executed this instrument, "shall not be subject to judicial review"? That is in the instrument, isn't it?

(Testimony of Max Jeffrey Kuney, Sr.)

A. It is there, yes.

Q. And in Section 3 there:

“The trustees shall have the right at any time, and from time to time, after a child of grantors for whom a share or fund of the trust estate is set aside attains the age of twenty-one years, to pay over, transfer, assign, convey, and deliver unto said child all or any portion of the share or fund then being held for the benefit of such child, as the trustee, in his sole and absolute discretion, deems to be for the best interest of said child.”

You do see that? A. Yes.

Q. You do also recall that? A. Yes.

Q. Again, “his sole and absolute discretion.”

A. Yes. In every place it was stated here, I recall that, and expected to find it there when I read the trust.

Q. Why did you say you expected to find it there?

A. Because I had read these other trusts and considered that that was the way trusts were made, and to the best [66] of my knowledge that was the correct and proper and legal way, and I didn't even question it. I don't know whether I was correct or not. Those are the things I have seen. I knew of no other type of trust. Those are the first trusts I had ever seen in my life when I went to Mr. Griffin's office.

Q. In that contact, then, if you will, Mr. Kuney, please turn to Page 10 with me to Section 8, where I read:

(Testimony of Max Jeffrey Kuney, Sr.)

“The trustee hereunder——”

and that is you, we are clear on that? A. Yes.

Q. “The trustee hereunder, his successors and substitutes——”

And the “successors” was your son, we are clear on that? A. Yes.

Q. “——shall be and he hereby is relieved from any and all of the duties imposed upon them by Chapter 229 of the Laws of 1941 of the State of Washington, as amended. Such trustee, his successors or substitutes, shall further be relieved from any and all duties so far as the grantors are able by this instrument to relieve him, which may in the future be imposed by amendment to said Chapter 229 of the Laws of 1941 of the State of Washington, or by any future [67] law or laws of the State of Washington, or by any existing or future law or any other state with respect to making or filing with any court or other place any report, inventory, or accounting of the principal or income of the trust hereby created.”

Now, my question, Mr. Kuney, in the trust instrument that you read in this man’s office, did this provision relieving the trustee from all this state law, did that exist in any of the trust instruments which you examined?

A. I am quite sure that it did. I found nothing, as I stated, and I read them there and got familiar with them, and then I found nothing in this one that Mr. Witherspoon prepared that was strange to me.

Q. But you do then recall, sir, that you insisted

(Testimony of Max Jeffrey Kuney, Sr.)

that such a provision do appear here before you executed it?

A. No, I didn't insist on that at all. I stated it happened as I told you. Mr. Witherspoon was known to me by reputation as a trust lawyer. That is his business. I know of his past, I know of his father, I know what the business is and was, and I wouldn't even—I wouldn't question his judgment on a matter of this kind because it is a thing I know nothing about. I didn't insist, I wouldn't know of anything like this.

The previous thing "under judicial review" is a [68] thing that apparently I hadn't even read before or read it but meant nothing to me. That means something to me, apparently the trustee can't be held liable, but I know different, by the way, regardless of what this may say. I think I know different because I have inquired.

Q. I had it understood, Mr. Kuney, from your direct testimony to say in effect as to the powers of trustee, it was something you were insistent on and understood and that under this instrument you had all the power with respect of this property that, I believe, your words were, a natural man would have. Do you recall that testimony?

A. I didn't—as I recall, I didn't testify that way.

Q. Did you express that thought accurately now?

A. No, this is what I believe I said or intended to say, that I had first read these trust instruments,

(Testimony of Max Jeffrey Kuney, Sr.)

because it was a new thing to me, and I wanted a little experience in the various types of trust——

The Court: You are getting afield, Mr. Kuney. What did you understand with respect of the powers of the trustee here? How wide were they?

The Witness. Absolute. I said that before, it didn't shock me when I saw it before.

Q. (By Mr. Biggins): As far as you know, Mr. Witherspoon did draft this document accurately in accordance with [69] your instructions and expressed intent?

A. I made no instructions, and I am sure no one made any instructions to Mr. Witherspoon as to the drafting of these matters here except right on about the first page, the hundred thousand dollars, and he would consult with us something about age thirty. But after this, I really don't think it would be—in my way of doing business some of these things wouldn't be the natural thing for me to do.

Q. I understand you to say, Mr. Kuney, you gave no instructions on this instrument?

A. Not in relation to such language as this. I may be wrong, but I did think that it was a sort of a form that was a legal form, and Mr. Witherspoon said it was so, and my concern was this only, that it had to be a trust. I certainly wanted it legal and correct.

Q. We are absolutely clear on that?

A. I am clear that that is what I wanted.

Q. And considered it a complete and accurate trust instrument, we are clear on that?

(Testimony of Max Jeffrey Kuney, Sr.)

A. That above all things. Certainly I wouldn't want to fail because of some instrument of this kind.

Q. I did notice in Sections 4 and 5 of this instrument, Mr. Kuney, that if, say, one Jeff—that is what you call Max III? [70] A. Yes.

Q. If Max should marry and fail to have children—if Max should marry and have children and passed away, of course, his share goes to his children, you did understand that? A. Yes.

Q. And you testified? A. Yes.

Q. But if the marriage fails to have children and then passes away, his wife gets nothing, it goes to the other grandchild? You understood that also, but if Max marries and has children——

The Court: Do you mean Max III? There are three Maxes here.

Q. (By Mr. Biggins): If he marries and fails to have children, his wife gets nothing at all if he passes away? A. Yes.

Q. If John marries and fails to have children and passes away——

A. (Interposing): Yes.

Q. (Continuing): ——his wife gets nothing?

A. Yes, I do understand that. I like that, and I understand it thoroughly. I like that agreement. I like that part. [71]

Q. Now, on that very same day, Mr. Kuney, on that very same day this very important trust instrument was considered, drafted, executed on February 11, 1952, there was another agreement executed, I believe you said? A. Yes.

(Testimony of Max Jeffrey Kuney, Sr.)

Q. What was that other agreement that very same day, February 11, 1952? Looking at Exhibits 24 and 25, would that help us?

A. That was merely a short agreement.

Q. A short agreement of what, sir?

A. Agreement of what to do under this trust agreement and partnership that I had not found completely covered in this agreement. I consider that when you take this agreement of this date, this agreement also of the same date, plus the things referred to in this date, there has been automatically covered everything that needs to be covered in any partnership agreement. There is nothing more to be said. It has everything in it, and this does refer to this, and it refers to the regulations which are a necessary part. You cannot distribute this thing and make it valid except by whatever regulations—the tax regulations say and makes it taxable. So the three, to my mind, were necessary to make a complete agreement.

Mr. Biggins: May it please the Court—— [72]

A. (Continuing): ——a complete statement of the agreement. There is other things, of course, in the partnership agreement, or else, and so forth, and always have been with me.

Mr. Biggins: May it please the Court, as I review my examination here I would request and appreciate if Mr. Grant passed Exhibits 1 and 24 and 2 and 25 to the jury for examination.

The Court: That may be done.

(Testimony of Max Jeffrey Kuney, Sr.)

(Whereupon, certain documents were passed to the jury.)

Q. (By Mr. Biggins): So the record may be clear as we pass those two together, Mr. Kuney, your testimony saying that this relates to that, so we will be clear in the record here, you are meaning that the trust, Exhibit 1, related to the agreement, Exhibit 24, about the distribution of profits, that is true, isn't it?

The Court: Would you just listen a moment before you read? I want you to hear, and it is difficult to read and listen. I try it all the time up here, and I have to do it because I have other work of the Court going on all day long here. But it is difficult and especially so if you are not trained to do that.

I would like that last question and answer [73] read to the jury.

Mr. Biggins: May I restate it?

The Court: Yes, please do that.

Q. (By Mr. Biggins): Exhibit 1, which Mr. Grant passed to the jury, you will recall, Mr. Kuney, is the trust? A. Yes.

Q. For Jeff and Caroline, of which you are the trustee, is it not? A. Yes.

Q. And Exhibit 24, which I requested be coupled with that, Exhibit 24 is the agreement about the distribution of partnership profits which you considered and executed in conjunction with Exhibit 1?

A. Yes.

(Testimony of Max Jeffrey Kuney, Sr.)

Mr. Biggins: Could we pass those along?

The Court: Yes.

(Whereupon, documents were passed to the jury.)

The Court: Now, let me just suggest this to you, you will have ample time later on to read these documents in detail. Don't attempt to do that now. Just glance at them so as to get an idea of what they are about. Do not read them word for word. Just take a glance at them so that your mind will recall them later when it comes time to study them carefully. [74]

That is what you have in mind?

Mr. Biggins: Yes, your Honor.

The Court: Pass them along.

Q. (By Mr. Biggins): Of course, the second part of my question, Mr. Kuney, was Exhibit 2, the trust for your other son, John Richardson Kuney, of which your son Junior is trustee, is also coupled with Exhibit 25, a similar type of agreement, isn't that true? A. Yes.

Mr. Biggins: And we have passed those to the jury?

The Bailiff: They are passed to the jury.

Q. (By Mr. Biggins): As we think about those instruments, Mr. Kuney, may I ask you this, in going over to this office where you looked at the trust instruments, are you mindful of that attorney's office now? A. Yes.

(Testimony of Max Jeffrey Kuney, Sr.)

Q. Did you also request that he show you partnership agreements for your examination?

A. No, I made no—nothing else. The trust was the thing that I didn't know about. I thought I knew about partnerships. I knew nothing. I never asked anybody.

Q. Well, all right. Now, we have this conference——

The Court: Excuse me, let us just let the jury pass those along now, and we will pause for a [75] moment so they may do that. Just glance at them and get an idea so that you will recognize them later on.

(Whereupon, there was a brief pause.)

Q. (By Mr. Biggins): Now, I notice, and please look at these instruments if you think necessary before answering my question——

A. Yes.

Q. Now, I notice, Mr. Kuney, in examining the trust agreement that we are concerned at least about a provision in that instrument about the “law of the State of Washington.” That is so set forth in that instrument?

A. The law of the State of Washington?

Q. May I direct your attention.

A. Yes, I see it now.

Q. In looking at Exhibits 24 and 25, I notice in that agreement, Mr. Kuney, no reference to the laws of the State of Washington, but rather to the rules, and you may follow the language with me,

(Testimony of Max Jeffrey Kuney, Sr.)

please—"the rules of law then effective for family partnerships—" Do you see the words "family partnerships"? A. Yes.

Q. Why the difference between those two instruments? The one was "State law" and the other "income tax law" about family partnerships. [76]

A. Well, may I first point you to the matter of time of the date that this was done?

Q. Certainly.

A. If at that time there are any code regulations that had been published yet, I don't know that they had, I have never seen them, but I was——

Q. (Interposing): Excuse me, may I make clear, when you say "code regulations" you mean, of course, Internal Revenue code?

A. I do, yes, sir. If there had been, I hadn't seen them. But I am explaining only this as you asked me to do. In this American Research Institute form that I did have and that I do have, I was alerted to a certain thing. But these other things, other things which I have forgotten, that you said were in there, I did not find there. I find some other things about what you do about if your son is in the service and so forth, which is glossed over and does not fit me—that the Treasury Department would contest these cases, and that it was important to observe these rules. All right. I did not know what those rules might be, but whenever they were published, I wanted them to be observed, and I so stated, and if they should be changed, I wanted them to be observed as changed, and I have so stated.

(Testimony of Max Jeffrey Kuney, Sr.)

I attempted in my way to make this thing last for [77] the term that I felt that it was important, and that was until the children were thirty years old, and as I see it, even though I didn't know what the rule was then, an agreement was then made that is valid and is able—that I know that at least the partners that are party to this thing thoroughly understand what is meant here by what these rules are and what they must do. That point is plain.

Now, if I was mistaken in thinking that this trust agreement itself whereby the trust becomes a partner is not itself a partnership agreement, then I am afraid I am mistaken. But it certainly does contain the thing and more things than I have ever even thought of putting in any of them—any partnership agreement I have made, and they have been many. But nevertheless, I do recognize that this is for a different purpose, and, therefore, can contain those things. But I do believe that it was my belief then, and it is now, that this plus this (indicating) plus those rules, if and when they are published, do make an absolute and complete set of rules as to how this partnership is to be governed and conducted, and at least we have found to date that they do have as between us without any trouble whatever.

Q. Mr. Kuney, in my questions I shall attempt to make it easier and quicker to answer. [78]

A. Well, if my answer is too long, I regret that.

Q. You did regard this agreement as a serious and deliberate business document, didn't you?

(Testimony of Max Jeffrey Kuney, Sr.)

A. It was—the trust agreement itself was a necessity because the children were minor.

Q. I am speaking of Exhibit 24. You did regard Exhibits 24 and 25 as serious?

A. I regarded this as the necessary part of this (indicating), yes, and knowing that——

Q. Would you listen to my question, please?

A. Serious?

Q. A serious and deliberate business document, that was important to you?

A. Serious, no, as I know the meaning of “serious,” sir.

Q. May I use the word “important”?

A. Yes.

Q. An important business document to you?

A. Yes.

Q. And it being an important business document, you, of course, discussed it with your attorney, didn't you?

A. No, I did not.

Q. Did your son discuss it with his attorney before he executed it?

A. Not that I know of. I am the one that was responsible for this thing. I am the one that typed the two things [79] the same way and signed them one place, and we should sign this when we have this thing completed.

Q. Excuse me, you said “We should——”

A. I prepared the document, and it shows where each one——

Q. You are referring to Exhibit what?

(Testimony of Max Jeffrey Kuney, Sr.)

A. Exhibit 24, and the other one is 25, both identical wording except the change of name.

I did prepare them, and at that time I considered this was the thing that I was in total ignorance of. This is an attorney's job.

The Court: Now, Mr. Kuney, I am sorry, but when you say "this" and "that," you must say what the exhibit number is so that we have some way of identifying it in the record.

A. I mean this trust agreement, Exhibit 1, was the thing that I never had any experience with and knew nothing of, prepared entirely by attorneys. But certainly when I read the terms, I thought I understood them, and I thought that is all right, and certain terms, I thought that was very good, and the others I thought that was a part of the usual formal trust agreement and went over it.

Q. (By Mr. Biggins): If you will, please, Mr. Kuney, to inquire into a little different area now, would you take Exhibit Q and have that before you, sir? [80] A. Yes, sir.

Q. Now, this question is quite important to us, the government, Mr. Kuney, so please think about it before you answer.

In 1953 we did form the Max J. Kuney Company, didn't we, the corporation? A. Yes.

Q. Now, at that time what was the understanding and agreement of the parties—and by "the parties" I mean you and your son as trustees—are we together so far?

The Court: Are you following up to that point?

(Testimony of Max Jeffrey Kuney, Sr.)

The Witness: I believe so.

The Court: All right.

Q. (By Mr. Biggins, continuing): You in your capacity as trustee and your son in his capacity as trustee, what was your agreement and understanding as to who it was that would own the corporate stock in this corporation? A. 1952?

Q. Excuse me?

A. 1953 and '4, it was our understanding at the beginning——

Q. (Interposing): By “the beginning” do you mean 1953?

A. At the very beginning when it was formed, the corporate stock would be owned by the various parties in their [81] various capacities. In other words, naming them by “Junior,” by “Senior,” by three trusts, altogether known as the Kuney family partnership. That was the original thing that was done. We changed that——

The Court: Now, don't get into anything. Answer this question first. What was your intention and understanding in 1952 when the corporation was formed as to who would own the stock of that corporation?

The Witness: Well, I answered that. I can leave the last part out.

The Court: Just tell us right to the point of who it was that was to own the stock in the corporation at that time.

The Witness: The Kuney family partnership.

Q. (By Mr. Biggins): Now, and you say at a

(Testimony of Max Jeffrey Kuney, Sr.)

later time it was changed? A. Yes.

Q. All right. Now, let us look at your corporate minutes, Mr. Kuney, which will be at the bottom of Exhibit Q, for February 7, 1957. Will you look at that on Page 2, at the bottom of the page where it says, "The chairman next pointed out"——

The Court: Wait until he finds it first. Have you got it now? [82]

The Witness: No.

The Court: Show him where it is.

Mr. Biggins: May I approach the witness, your Honor?

The Court: Yes. Point it out.

Mr. Biggins: It is right here (indicating).

The Court: Why don't you read it and let him follow. Just be sure you are reading right. Read the part that you want or point out to him what you want him to read. Have you got a copy?

Mr. Biggins: Yes, your Honor.

Q. (By Mr. Biggins): "The chairman next pointed out——" and would you read that, please, Mr. Kuney?

The Court: These are minutes of what date?

Q. (By Mr. Biggins): If you will turn to February 7—excuse me, February, 1957, your Honor.

A. 1957?

Q. Yes, February, 1957. A. Yes.

Q. And the chairman at that meeting, of course, was you, are we clear on that? You were the chairman? A. Yes.

Q. All right. A. And I was president.

(Testimony of Max Jeffrey Kuney, Sr.)

Q. "The chairman," meaning you, "next pointed out—" [83] could you read it for us, please?

A. Yes.

"The chairman next pointed out that the original corporate stock issued in a single certificate in the amount of \$400,000 to the Max J. Kuney Company partnership was incorrectly issued and the stock should have been issued in two separate certificates in amount of 200 thousand shares each, one to Max J. Kuney and one to Max J. Kuney, Jr."

Q. That is far enough unless you wish to continue, Mr. Kuney. The stock was incorrectly issued?

A. That is the wording, yes.

Q. And that was the wording you used at that meeting as chairman?

A. These are the words in the minutes.

Q. And so as a result of that incorrect issuance of the stock, after discussion and motion the following resolution was adopted:

"Resolved, that the directors of Max J. Kuney Company are hereby authorized to recall and cancel the original stock certificate issued to the Max J. Kuney Company partnership and replace this certificate with two separate certificates in the amount of 200 thousand shares each, one to [84] Max J. Kuney and one to Max J. Kuney, Jr."

That is what it states there?

A. That was done.

The Court: Well, that may be, but just follow the question, Mr. Kuney.

Go ahead. It so states.

(Testimony of Max Jeffrey Kuney, Sr.)

Q. (By Mr. Biggins): As a result of that action, Mr. Kuney, we took—we completely destroyed——

The Court: You had better avoid the use of the word “we.” The jury will think you did it.

Q. (By Mr. Biggins): As the result of this corporate action of canceling the certificate made out to the partnership, after that was done, Mr. Kuney, you, of course, understood that Jeff, Caroline, John Richardson, no longer had any interest at all in that corporation? You understood that?

A. I understand that.

Q. All right. Although that wasn’t the original intent at all at the time that the trust instrument was executed? A. No.

Q. And although the minutes—as the official minutes of the meeting, at which you presided, states that was all a mistake? A. Yes.

Q. And although in the deposition—you do recall we [85] took a deposition some weeks ago?

A. Yes.

Q. You do recall that? A. Yes.

Q. Although that is not the same story you told us at that time? That is true, isn’t it?

A. I don’t know that, sir.

The Court: All right. Read the deposition.

A. I don’t believe that——

The Court: You don’t recall having made any statement at the time the deposition was taken contrary to what you state now?

The Witness: No, I don’t recall that.

(Testimony of Max Jeffrey Kuney, Sr.)

Q. (By Mr. Biggins): Do you recall on Page 27 of the deposition taken in Spokane on May 4, 1960, in answer to a question where you stated——

The Court: Excuse me, just a minute, this is the official transcript, Mr. Kuney. You may follow that as read. Go ahead.

Q. (By Mr. Biggins): Let us turn over to the other page to be absolutely clear that I have left nothing out, Mr. Kuney, and let us see Mr. Anderson's question, Line 23,

“Well, now, let me see if I——”

The Court: Let him find it first, please. [86]

Line 23, what page?

Mr. Biggins: Page 26.

Q. (By Mr. Biggins): Do you have it with me, Mr. Kuney? A. Yes, I have it now.

Q. “Question. Well, now, let me see if I have got this straight, and you say that in the beginning in 1953——”

A. No, I don't have it. That is not what it says on this page. What page again, sir?

Q. Page 26, Line 23.

A. Yes, now I have it.

The Court: Now he has got the place. Read it to him.

Now, Mr. Kuney, let me explain to you, counsel is going to read the question and answer, maybe several to you now, from the transcript, and he will then ask you if this is not a correct reading of the transcript and your testimony at that time, which is what you are to respond to.

(Testimony of Max Jeffrey Kuney, Sr.)

Is that clear to you?

The Witness: Yes.

The Court: Go ahead.

Q. (By Mr. Biggins): And the question beginning on Line 23, Page 26,

“Well, now, let me see if I got this straight, [87] you say that in the beginning in 1953, or was that January the first?”

You answered,

“Of course, yes.”

The next question,

“Now, of course, in '53 you created a corporation?” Yes.”

“And this corporation did what?”

“It is the operating organization of the construction business. It operates the construction contracts.”

“And who were the stockholders in this corporation?”

And what was your answer to that, “And who were the stockholders in this corporation?”

A. “My son and I, and there have been stockholders added since that time.”

Q. My question, “But these trusts have never had any interest in that then?” What was your answer? Your answer, sir, was what?

A. “The trusts have never had any interest in the profits and losses of the corporation.”

Q. “The trusts have never had any interest in the profits and/or losses of the corporation?” [88]

A. Yes.

(Testimony of Max Jeffrey Kuney, Sr.)

Q. Would you care to explain that answer?

A. I believe I am mistaken.

Q. I see. All right.

A. That is my answer.

Q. But this much we are very clear on, I believe, then, at this time, Mr. Kuney, that in the beginning the children, Jeff, Caroline, and John did have an interest in the corporation? A. Yes.

Q. Signals were changed at a later time by you or by you and your son? A. By——

Q. Very well. That is your wording.

The Court: Well, that is the wording that is in the minutes. You say, "The chairman pointed out——"

A. I misunderstood him. I thought you said "Signals were changed."

Q. (By Mr. Biggins): They were later deprived of that interest, weren't they?

A. The investment was placed elsewhere, and they were deprived of their interest in the corporate stock, and their money was invested elsewhere.

Q. They were deprived of their interest in the corporation, [89] weren't they?

The Court: Please answer directly to the question.

A. Yes.

Q. (By Mr. Biggins): And all they had left was the interest in the fixed assets which were leased to the corporation, leased or rented, that is all? A. That is what they had.

Q. And you have never in your long business

(Testimony of Max Jeffrey Kuney, Sr.)

life ever treated a business partner that way now, have you? A. (No response.)

Q. Let us speak about the rent then, Mr. Kuney. You did say, I believe, sir, that the only——

The Court: The record will show no response to the last question.

Go ahead.

Q. (By Mr. Biggins): You did say, I believe, Mr. Kuney, that the only computation that had to be made was the salary computation to see what income would flow into these trusts. Did I understand that correctly?

A. That would not be a computation. I meant to say that before you could make any computation, you have to arrive at the reasonable rate to be deducted. Therefore, the computation to be made would certainly be to compute the percentage interest of one to the other. [90]

Q. Well, in the beginning, I believe, sir, that the profit that you received from the partnership was shared with the beneficiary of your trust, John Richardson, that is clear, isn't it?

A. Yes, it was.

Q. And the way in which that profit from the partnership was shared was in proportion to your capital account? A. Yes.

Q. If his account was ten per cent, you would get 90 per cent, he would get ten?

A. That is correct.

Q. Now, it is true that in the subsequent years both you and your son altered at your convenience

(Testimony of Max Jeffrey Kuney, Sr.)

the amount you retained in the capital account, that is true, isn't it?

A. The fact is—that is not true.

Q. Please explain. Please explain, if you will, please, sir.

A. Oh, yes. As I stated before, in later years the partnership's interest was in fixed assets.

Q. I am having difficulty hearing you.

A. In later years the partnership's interests were in fixed assets.

Q. By "later years" you mean after their interest in the corporation was extinguished, is that what you mean by "later years," 1953 and on?

A. Yes, in later years, yes. And there was continual trading [91] done in fixed assets.

Q. And continual trading by whom?

A. By the partnership buying and selling machinery and equipment as needed, not in a trading business, but the construction business. More equipment would be bought. Other equipment would be sold, and every one of those sales changed the total investment in fixed assets. Every purchase and every sale was a natural thing that followed and a necessary thing. That is the way the investment changed and not at our convenience except as you might say, that the machinery was bought at our convenience for use at the time.

The change in investment followed through the purchase of other machinery and other equipment and the sale of something that was old.

Q. I should like to inquire into that, Mr. Kuney,

(Testimony of Max Jeffrey Kuney, Sr.)

and come back a moment later to the capital account which was really the question I was asking about now. But this area you mentioned, trading or whatever the expression is, in these old assets——

The Court: You are going to pass that for the time being?

Mr. Biggins: I am going into this very thing he brought up. That is what I want to inquire into.

Q. (By Mr. Biggins): The partnership did rent or lease [92] something—the partnership, of which the kids were members, did lease or rent the fixed assets to the corporation? That is clear?

A. That is correct.

Q. And it is the dealing in those fixed assets you were just talking about? A. Yes.

Q. Now, then, when on the books of the family partnership—the assets being rented to the corporation on these books has completely depreciated—are you with me, sir? A. I think so.

Q. You do understand, not being an accountant, you do understand some bookkeeping and accounting, your having been a bookkeeper?

A. I understand what you say, yes.

Q. The corporation was using fixed assets. Then on the books of the family partnership they had been completely depreciated? A. Yes.

Q. Did the corporation pay rent to the partnership? A. In the year 1952?

Q. Any year. The answer is no?

A. The answer is yes, in certain years.

(Testimony of Max Jeffrey Kuney, Sr.)

Q. Oh, and what was the determining factor—certain years? [93] What years, Mr. Kuney?

A. In the years late in '53 and late '54, as I previously testified, that entire matter of rental was recomputed and determined by Revenue Agent Mr. Carney, and accepted by us, and that is the determination that we are with now, sir. As to the later years, why, there is another question or another answer.

Q. As I understand your explanation, then, Mr. Kuney, it was recomputed—for whatever the reason, it was recomputed at a later time and retroactively applied?

A. By Mr. Carney, and the income tax returns were amended.

Q. And you made the amount of rent being paid by the corporation to the partnership dependent on tax considerations?

A. I made it dependent on what he recomputed it, sir. He just merely changed our method without really materially changing our amounts, and that is a fact.

Q. Which was not done in the case of the other partnerships with Lloyd and Greene?

A. It was done in connection with the rental of all machinery and equipment, as I remember it now. It is a total matter, that is the total rent that the corporation paid to the partnership was changed slightly from our original tax return by an examining officer's findings, which we accepted and have

(Testimony of Max Jeffrey Kuney, Sr.)

long since made entries to [94] correct it, and it is a matter that we thought was final.

Q. You settled out with your other business partners, Johnson and Greene, at the end of every business year? That is true, isn't it?

A. I don't understand "settling out."

Q. You determined your profits and losses and had your distribution at the end of every business year when the books were closed? That is true, isn't it?

A. Yes, at that time.

Q. But that didn't apply between the corporation and the family partnership? That is also true, isn't it?

A. No. The corporation happened to be a fiscal year, sir, instead of a calendar year and another thing that can't be avoided. It would be done in May. We had at that time a fiscal year corporation, a calendar year partnership, and there was varier dates. But always our profit and losses are determined and rendered on the books as soon as we can do them at the end of the tax year even if that happens to be May, or if it is June or July, or if it is December.

Q. But it is true in 1958 the corporation was still discussing and trying to decide how much, if any, rent should be paid by the corporation to the family partnership for '54 and '55, that is true?

A. That is a matter—— [95]

Q. As indicated in the minutes?

A. Yes, sir, certainly. Each year it is a bargaining between the two.

(Testimony of Max Jeffrey Kuney, Sr.)

The Court: No, you haven't followed the question, Mr. Kuney, and I want you to answer the precise question, please. Go ahead.

Q. (By Mr. Biggins): In 1958, about that time, 1958, the corporation was still discussing and trying to determine what rent, if any, should be paid by the partnership to the corporation for '54 and '55, that is true, isn't it?

A. If you refer to the minutes—can you refer to something?

The Court: Are you able to recollect it without the minutes?

Q. (By Mr. Biggins): You don't know?

A. In the year 1958——

The Court: If you say "No," we will find it. The question is, do you know?

The Witness: No, I do not know that.

The Court: All right. Go ahead.

The Witness: I don't know that.

Q. (By Mr. Biggins): Would you look with me, please, sir, I believe it is the same minutes you had before, "The chairman next pointed out that the original corporate [96] stock—" and read what we read about—read what we had said about had been incorrectly issued.

The Court: He lost that place. You had better find it again.

(Whereupon, Mr. Biggins approached the witness.)

Q. (By Mr. Biggins): Is that '57 or '58? This

(Testimony of Max Jeffrey Kuney, Sr.)

minute is February 7, 1957, isn't it, Mr. Kuney?

A. Yes, that is the date.

Q. And over on the page right above where we said the partnership incorrectly issued, do you see the language, "it was discussd—" and they were talking about this was not a tenable position——

A. May I find it, please?

The Court: Try and orient him on the place each time.

Mr. Biggins: I thought I had pointed it out to him.

The Court: Give him the line number.

Mr. Biggins: There is no line number here.

The Court: Well, count it.

The Witness: I find the place now.

The Court: All right. Go ahead now. Read what you wanted to read.

Q. (By Mr. Biggins): "——pending clarification there was discussed that rental charges on fixed assets for [97] year——"

The Court: He is not with you for some reason.

A. You are not reading where you put the ruler.

The Court: About how far down the page?

Q. (By Mr. Biggins): That is right where I put the bookmark.

A. Will you start at the beginning?

Q. Oh, certainly. Try and keep your place, Mr. Kuney, so that we can get on with it.

A. I will.

The Court: All right. Go ahead.

(Testimony of Max Jeffrey Kuney, Sr.)

Q. (By Mr. Biggins): Well, starting at the beginning of the paragraph, sir,

“The next item of discussion advanced by the chairman concerned the matter of payment of rental by the corporation to the Kuney family partnership for fiscal years 1955 and 1956 and interest on the partner’s investment in those fixed assets.”

A. Yes.

Q. “It was discussed that the examining Internal Revenue Agent had taken the position that the fixed assets in Seattle were, in effect, transferred to the corporation.”

A. Yes.

Q. “It was discussed that this was not a [98] tenable position, and the corporation has protested accordingly, however, pending clarification it was discussed that rental charges on fixed assets for years 1955 and 1956 should be held in abeyance until the treasury’s position on this question was better known.”

A. Yes.

Q. And that is exactly what you did, isn’t it?

A. Oh, yes.

Q. And you resolved,

“Resolved that for the time being the Kuney family partnership shall not charge the corporation rental for the use of its fixed assets fiscal years ending 1955 and 1956——”

A. (Interposing): We just wanted to find out what to do until a certain time.

Q. And if you will look at the next minute, we were still having that same trouble in 1958, as I stated, as you remember?

(Testimony of Max Jeffrey Kuney, Sr.)

A. No, I don't remember.

Q. Where is the next minute, just following that or somewhere else?

Mr. Biggins: Never mind.

A. I notice we are having trouble with the examining officer's finding at this time, but I don't remember [99] it kept on into 1958.

Q. Now, on the salaries, Mr. Kuney, we have discussed that there was some buying and selling of fixed assets? A. Yes.

Q. Do you recall that? A. Yes.

Q. And, of course, when those fixed assets are sold, capital gain was claimed and allowed, do you recall that? A. In some cases, yes.

Q. And it is also true that when that capital gain was allowed, you and your son insisted that your salary be distributed in the form of capital gains? That is also true, is it?

A. No. What was done was done. But I don't recall any insistence——

Q. Well, are you familiar with the accounting documents which your bookkeeper, I believe Mr. Peterson, and your accountant, Mr. Bowen, referred to as the "Bible"?

A. I referred to it as the Bible, and I should be, I wrote it.

Q. And what do you understand that I mean by the word "Bible"?

A. Well, possibly it is something that some people don't read, I don't know. [100]

Q. Now, I mean here——

(Testimony of Max Jeffrey Kuney, Sr.)

The Court: What papers in this case—related to this case?

A. Why, there is simply a series of journal vouchers numbered one to a certain further place. I know of no reason to describe it as “Bible.” But I know what you mean.

Q. But we did establish that you are the one that wrote it? A. I did write it.

Q. All right. Do you recall, on Page 4—and may I call it the so-called “Bible,” where you wrote in 1957 under “Partnership Agreements,” the words,

“The partners of Kuney family partnership agree that effective January 1, 1955, and until this agreement is changed in writing:

(1) Active partners Max J. Kuney and Max Kuney, Jr., shall receive total compensation \$10,000 per year from partnership income to be divided equally between them and that the remaining income shall be distributed in proportion to each partner’s capital investment in the partnership.

(2) Active partner’s compensation each year shall be taken entirely from partnership [101] capital gains if such are sufficient, with the balance to be taken from partnership ordinary income only when such is sufficient and capital gains are not sufficient.”

Do you recall that?

The Court: Do you remember writing that?

A. I am certain I wrote it. He is reading from what I wrote.

Q. (By Mr. Biggins): You wrote it in 1957?

(Testimony of Max Jeffrey Kuney, Sr.)

A. Whenever it was dated is when I wrote that.

Q. To apply retroactively to 1955?

A. If it so states.

Q. All right. And this is not the first time mentioned in the writing that partnership income is to be divided equally between them—that is the first time any distribution of income is mentioned in writing, that is true, isn't it?

A. No, sir, that is not true.

Q. What written documents do we have before this time that set forth the manner in which the income earned by the partnership will be distributed to the trust and the active partners?

A. I can't remember the exhibit number, it was passed to the jury, and it is dated February 11.

Q. Do you mean the trust agreement? [102]

A. Sir, excuse me?

Q. Do you mean the trust instrument or the agreement?

A. I don't remember the exhibit number.

The Court: Get the ones that were passed to the jury. They are right there.

A. It is not the trust instrument, it is the other paper.

Q. (By Mr. Biggins): Do you mean the instrument, in other words, which you signed,

“The undersigned hereby agree that effective January 1, 1952, total Max J. Kuney income shall be distributed annually between Max J. Kuney and trust dated——”

That is the instrument you mean, Exhibit 24?

(Testimony of Max Jeffrey Kuney, Sr.)

A. Yes.

Q. “——Total Max J. Kuney income shall be distributed annually between Max J. Kuney and trust——”? A. Yes.

Q. Where does it say on that instrument how much will be distributed to each?

A. Where it says,

“——provided by the rules of law then effective for family partnerships and in conformity with the provisions of said trust.”

Q. And pursuant to that may I then understand, Mr. Kuney, that in some years you got 80 per cent of the income, [103] in some years you got as little as 20 per cent of the income, and in some years you got just exactly the same amount, all pursuant to this Exhibit 24?

A. All pursuant to that and pursuant to the necessity—it was if those are the percentages.

Q. And the necessities, as you discussed them and determined them long after this instrument was entered into, necessities considered and discussed long after this instrument was written and entered into?

A. I do not agree. At all times the interest was computed in accordance with the percentage of capital interest held by the partners, and that is determined by the actual existence of such things as trucks, tractors, land and buildings and matters of that kind.

Q. Would you recall, Mr. Kuney, that in 1952, was the very first return on which you reported ap-

(Testimony of Max Jeffrey Kuney, Sr.)

proximately 42 per cent of the profit, 41.78, and John R. about eight per cent, would you recall that, sir?

A. Yes, I can recall that would be about it.

Q. Would you recall subsequently in your Bible entry for 1956 that you didn't write until January 7, 1957, that you entered your income as around 10 per cent, and your trustee John R. was 40.92? Would you remember that?

A. That could be entirely possible as his interest changed.

Q. But even though that was in the Bible, when we came to [104] the income tax return, we changed it then to 24.73? Would you remember that?

A. I would remember that the changes were made as the—as the capital interest changed always, and I think they are always correct.

Q. And tell me, Mr. Kuney, and this is my final question, what representative or what voice did the grandchildren have in changing the capital interest, any at all, besides you?

A. Assets were bought as needed.

The Court: Please answer this question.

A. What voice did the grandchildren have?

The Court: If you don't understand, he will repeat it or explain it. But please answer the question. Go ahead.

The Witness: Please ask me again.

Q. (By Mr. Biggins): You say, sir, and I don't mean to make——

The Court: Just put the question.

(Testimony of Max Jeffrey Kuney, Sr.)

Q. (By Mr. Biggins): You say these changed as the capital interest changed. The capital interest changed sometimes even two years after the year was closed, the capital interest was changed by you.

A. It was dated back to put in an amended tax return, which [105] was required by the very necessity that our books were changed by examining officers, and we might even foresee the necessity of doing that at any time. Those things must be done.

Q. I am now asking you about the other partners in the family partnership. What right or voice or what representative did Jeff, Caroline, and John R. have in changing this capital account?

A. Their trusts have the rights.

Q. Who is their trust?

A. The children——

The Court: Just answer the question.

A. The trusts have the rights.

Q. (By Mr. Biggins): Who is the trustee for Jeff and Caroline? A. I was.

Q. And who was the trustee for John R.?

A. Junior.

Q. And who executed—typed on their own typewriter Exhibits 24 and 25 as you stated a moment ago? A. The initial is “F. P.”

Q. Who prepared and presented Exhibits 24 and 25, as you testified a minute ago?

A. I dictated them. I wrote them, typed by some one else.

Mr. Biggins: That is all. [106]

The Court: Redirect.

(Testimony of Max Jeffrey Kuney, Sr.)

Redirect Examination

By Mr. Toole:

Q. Mr. Kuney, directing your attention to the stock ownership of the corporation, you testified on cross-examination that the stock of the corporation had been originally issued to the partnership?

A. Yes.

Q. And that in 1957 you testified you corrected what had been——

The Court: I don't think you should summarize the testimony, because you are going to get into difficulties that way. Let us have just redirect examination now, please.

Q. (By Mr. Toole): The question is complicated by withdrawing the stock from the partnership and turning it over to you and your son individually. Did that hurt the trust?

A. No, it turned out to be a benefit to the trusts.

Q. How?

A. As stated, the corporation had a bad year, and the trusts continued to profit, but that was not a thing that was foreseen at the time.

Q. Did the corporation ever pay any dividend to the [107] partnership? A. No.

Q. There was no income being earned by the partnership from the ownership of the stock of the corporation? A. None.

Q. So that even while the corporation stock was owned by the partnership, the children weren't receiving any share of the profits?

(Testimony of Max Jeffrey Kuney, Sr.)

A. That is what I said, they never did receive any profits or losses.

Q. From the corporate operation?

A. Regardless of the fact, they owned stock and there was no dividends or profits, nothing happened.

Q. What happened to your capital account investment in the partnership when the stock was withdrawn by you from the partnership? Did it increase or decrease, your personal capital account?

A. May I have a moment? That is a rather involved accounting question.

The Court: Well, the first part of the question, what happened?

The Witness: Book entries were made.

Q. (By Mr. Toole): What happened to your capital account investment in the partnership, did it increase or decrease when the stock was withdrawn by you from the [108] partnership?

A. I am sorry, sir, I don't understand.

The Court: Don't lead now, keep it nonleading and suggestive. Let him answer himself.

A. I regret, I don't understand. I know the book entries were made. If I could see them, I would know, but at this time, after thinking longer, I believe I can answer your question, if I may.

Q. (By Mr. Toole): Please do.

A. It was just changed from one investment to another, nothing happened as to increasing it over all. Whatever it was taken out from and put into, it would just merely be reflected by a book entry.

Q. Did the withdrawal of the corporate stock

(Testimony of Max Jeffrey Kuney, Sr.)

by you and your son or the transfer to your personal account affect the profit-sharing ratio in any way of the family partnership?

A. Well, as it turned out, it improved the profit-sharing ratio because the corporation didn't make money, but the position of the family partnership was improved.

Q. How was it improved?

A. Well, they continued to make profit, whereas, the corporation lost, and if they had an interest in it, they would have lost with it.

Q. Directing your attention to the corporate minutes, and [109] this is the minutes of February 7, Exhibit Q—directing your attention to Page 2 of the minutes of February 7, 1957, Page 2, the paragraph that was read earlier on the withholding of rental income for the fiscal years 1955 and 1956—

A. (Interposing): Yes, sir.

Q. I believe Mr. Biggins didn't read the complete wording of the paragraph? A. No.

Q. In the center of that paragraph do you find the words, "Following this detailed discussion, on motion duly made, seconded and unanimously carried the following resolution was adopted——"?

A. Yes.

Q. And doesn't it go on to say,

"Resolved that for the time being the Kuney family partnership shall not charge the corporation rental for the use of its fixed assets fiscal years ending 1955 and 1956 but that following clarification of the Internal Revenue department's position on the

(Testimony of Max Jeffrey Kuney, Sr.)

matter of the Seattle assets proper rental may be subsequently charged retroactively and, be it further resolved, that the corporation shall pay interest on the partner's investment in fixed assets during the years in [110] question at the interest rate the corporation paid to the bank for borrowed money during those years."?

A. It so states.

Q. Were rents ever paid by the corporation to the family partnership for the years 1955 and 1956?

A. Yes.

Q. Were adjustments made or not made with the Internal Revenue Service regarding these rentals?

A. They were made.

Q. And after the determinations had been made, did you or did you not credit the partnership with rent?

A. We did credit it after the determination was made.

Q. Were amended income tax returns filed, or were they not?

A. They were filed.

Q. Reflecting this income?

A. And taxes were paid.

Q. There has been reference to the "Bible." When did you first hear of the word "Bible" in connection with these journal entries?

A. Last Saturday—day before, whenever it was—Saturday of this week.

Q. Was this a rather irreverant designation by the office as far as you were concerned? [111]

A. I don't care what they call it. It was the title used for some reason by the government.

(Testimony of Max Jeffrey Kuney, Sr.)

Q. Why was it necessary for you in February of 1957 to make adjustments adjusting entries affecting the capital account for the years 1955 and 1957?

A. Because Revenue Agents had been in our office for days, and we were about—for the first time appeared to have our tax returns changed to any effect, and I come over to see what it was about, and there I found them.

Q. Why was the adjustment—Strike that.

What matters had arisen which required adjusting entries?

A. All the things that they had done changing our records, changing our income.

Q. By “they,” whom do you mean?

A. The Internal Revenue.

Q. Could you describe specifically who had made these adjustments?

A. Yes, the Bible specifically describes it under oath.

Q. Who was it? A. What?

Q. Who made these adjustments? What Revenue Agent made them? A. Mr. Carney.

Q. The gentleman sitting over there—— [112]

Mr. Biggins: He was the gentleman sitting here. He has left the courtroom momentarily.

Q. (By Mr. Toole): What was the nature of these assessments? Could you describe for the jury some of the more important factors that required adjustment?

A. Well, the findings proceeded at great length

(Testimony of Max Jeffrey Kuney, Sr.)

to change things to very minor amounts through all the years. But in addition to that, the findings found—what stated in the—as issues as to why the income of the trusts should be taxed to me instead of to the recipient of the income, and the so-called Bible states and quotes by page and line from the examiner's order findings and is a complete—or is my, rather, statement in connection with those findings and the entries that were made in the books. They are very—rather complete, I believe, general vouchers that completely describe and quote and refer to various places, and the entries are quite apparently necessary, because, as it says, "E. O. F.," examiner officer's findings for certain years, page so and so, line so and so.

Q. I believe you have answered the question.

Let me ask you this question, did the examining agent ever find any unreported income on your books?

A. Never in all the years we have been in business.

Q. Did the examining agent find any deductions that you [113] should not or that were——

Mr. Biggins: If the Court please——

The Court: Immaterial. There is no contention about that in the case, so it is irrelevant and immaterial.

Q. (By Mr. Toole): Is it true or not true that these adjustments were a question of timing as to when deductions should be taken and who was taxable on them, how much rental?

(Testimony of Max Jeffrey Kuney, Sr.)

A. The important thing was whether it was taxable to one party or another, but incidentally throughout the thing requiring all these intricate changes which were very minor, because I'd say they were less than one per cent of the total, \$4,200, but minor in percentagewise. It required much book-keeping, much changing, much amending of tax returns, and incidentally, much confusion to people trying to run a business.

Q. Is it true or is it not true that always the profit has been divided according to the capital interests of the trusts?

A. Always. That is true.

Q. I don't mean trusts, I mean all of the partners?

A. Never in any other fashion whatsoever to my knowledge, and my knowledge is complete. Never in any other manner, except the surplus that the trusts have which is left [114] over after they have—after all the assets have been bought, draws interest. Now, that is also an added amount. Their source of income is from rent and interest on their investment, and the corporation pays it, and it has been handled that way. I don't know whether it is correct, may I explain the word——

The Court: Well, you will have to wait for a question from your counsel, Mr. Kuney. Go ahead.

The Witness: That one word "incorrectly."

The Court: All right. Tell us what you want to about it.

A. I meant it just only in the accounting sense.

(Testimony of Max Jeffrey Kuney, Sr.)

I think it is incorrect to issue corporate stock to a group of partners. It should be issued individually, one, two, three, four, five, six, like General Motors does. That is all I meant by "incorrectly." It is just a matter of opinion, an accounting concept. It is easier to think of it that way, and I believe I would again say that issuing it individually is correct, and the other way is cumbersome and incorrect. That is the meaning of the word "incorrect" in that topic.

Mr. Toole: That is all.

The Court: Recross.

Mr. Biggins: Two further questions. [115]

The Court: Go right ahead and we will finish with this witness.

Recross-Examination

By Mr. Biggins:

Q. You do recall, Mr. Kuney, writing this letter to your son Junior about the money that his mother needed for the operation—for her parents? You do recall that occasion?

A. That is one letter I do remember very well, sir.

Q. And I believe that is Exhibit 33, Mr. Grant. Do you recall my question, Mr. Kuney? Do you recall that in that—is that the letter?

A. No, this is a rental agreement.

Mr. Biggins: It is Exhibits 26 and 27. If the Court please, to save time, may we show him——

(Testimony of Max Jeffrey Kuney, Sr.)

(Whereupon, certain documents were handed to the witness.)

Q. (By Mr. Biggins): This is the very first letter on the very first distribution under these trusts, that is true, isn't it, December, 1952, Exhibit 27?

A. February 11, 1952, is the very first document directing anything about it——

The Court: The first letter concerning [116] a distribution.

A. First letter concerning distribution, yes, it is, sir.

Q. (By Mr. Biggins): And the concluding paragraph, after we took care of Lorraine and her parents who have been ill, the very last paragraph,

“If, as trustee, I deem it advisable to make any further distributions from the 1952 income of the trust to other persons eligible to receive such distribution I will issue instructions prior to the end of the year 1952.”

A. That says that, yes.

Q. You would advise prior to the end of the year 1952? A. Yes.

Q. All right. Now, distributions were made for 1952 after this letter, weren't they? A. Yes.

Q. The \$10,000 you mentioned for Max and Caroline? A. Yes.

Q. And around \$18,000 for John R.?

A. Yes.

Q. And those distributions were made after the tax consequence were determined in April of 1953?

(Testimony of Max Jeffrey Kuney, Sr.)

A. Whenever they were made. I don't recall.

The Court: Well, don't you recall that they were made at that time? [117]

The Witness: No, I don't think they were. I don't remember the time that we filed tax returns, and we usually know tax consequences long before even the end of the year because that can be readily computed. We have a pretty good idea of what we are going to make.

Q. (By Mr. Biggins): You would have no doubt that the date on the books would be accurate?

A. I have no doubt of that. The date that is indicated on any original journal voucher would be correct.

Q. And my last question of this battery is, is it true, then, that you did issue instructions prior to the end of 1952, as you said you would do, if further distributions of '52 income were to be made. In a word, sir, you didn't?

A. I probably didn't. I said I would do it before the end of 1952, but I might have done it a couple of months later.

Q. You mentioned, Mr. Kuney, that profit distributions were made only in accordance with capital interest. Did I recall that testimony correctly, sir?

A. With the exception of these special beneficiaries.

Q. Now——

A. (Interposing): No exceptions, they were made to the trusts that way, no exceptions. [118]

(Testimony of Max Jeffrey Kuney, Sr.)

Q. But in addition to your recorded capital account on the books, you had what you call a capital surplus account, didn't you?

A. I believe that is a correct name.

Q. And your son had a capital surplus account?

A. Yes.

Q. And you controlled the amount that would be in that capital surplus account, didn't you?

A. No.

Q. Who did?

A. The amount of income, we controlled it. I just can't create it with a pencil.

Q. You did not? A. No, I did not.

Q. Could you explain for us, Mr. Kuney, why for the Bible in 1955 that your interest in the income was 16.99, John R.'s income was 33.66, and that for the amended return which you filed 4-14-58, your share of income was 28 per cent and John R.'s was 22.4? How do you explain that, Mr. Kuney, if your distribution was always in accordance with capital interest which you could not control?

A. I believe I can explain that quite easily.

Q. Please do, sir.

A. You state that in one original return it was one way and [119] on an amended return it was another way, did you not?

Q. This is the Bible? A. What?

Q. This is the Bible—subsequent to the Bible you prepared an amended return—so I might state this, this is in 1957—this is in 1957 while we are still trying to figure out what happened back in

(Testimony of Max Jeffrey Kuney, Sr.)

1955, and in 1957 concerning 1955 in your Bible you say 17 per cent, in your amended return you say 28 per cent. In one your son has more and in the other your son has less? A. Yes.

Q. Its determination is all in accordance with capital interest which you do not recall?

A. Do you want an explanation?

Q. Yes, we want you to explain.

A. First it is an amended return. Bear that in mind. That means there is a change of figures by necessity. That is enough explanation.

Q. (By Mr. Biggins): That is the only one you care to give? A. That is sufficient.

Mr. Biggins: That is all.

The Court: Is there anything further from this witness?

Mr. Toole: That will be all.

The Court: You are excused, Mr. Kuney, and you [120] may step down.

(Witness excused.)

We will recess now, ladies and gentlemen, until tomorrow morning at 9:30. Would you please keep in mind my admonition. I hope you have a pleasant and restful evening and that you come back in the morning refreshed and ready to carry on with this case. Good night.

(Whereupon, at 4:30 o'clock p.m., the court recessed.) [121]

Tuesday Morning

(Whereupon, on Tuesday, November 22, 1960, at the hour of 9:30 o'clock a.m., all counsel heretofore noted and the jury being present, the following proceedings were had, to wit:)

The Court: Go ahead, please.

Mr. Harmon: Mr. Henry, please.

JAMES M. HENRY

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined, and testified as follows:

The Clerk: Would you state your full name and spell your last name?

The Witness: James M. Henry, H-e-n-r-y.

Direct Examination

By Mr. Harmon:

Q. Where do you reside, Mr. Henry?

A. Boise, Idaho.

Q. And what is the name of your business firm?

A. Henry, Rust & Company.

Q. And what business are you engaged in?

A. General insurance and sureties, specializing in contract bonds. [122]

Q. And what company or companies do you represent?

A. We represent some twenty different insurance companies over the United States.

(Testimony of James M. Henry.)

Q. Would you explain briefly what the insurance business is?

I am not sure that the jury knows any more about it than I do.

A. Whenever a contract is let by any governmental agency, starting with the federal government down through the states, city, county, a requirement of the contract is that the contractor provide a surety bond wherein the owner or the government, as the case may be, is guaranteed that the contract will be faithfully performed and that all labor and material men will be paid. That is a must, and the surety becomes a third party of all contracts.

Q. Now, what information must the surety know about the contractor before he is willing to issue a surety bond for the contractor?

A. Well, it is very essential, inasmuch as this is a direct financial guarantee, that we have particularly three things that we are interested in; first, we want to know the character of the party we are bonding; secondly, we want to know, does he have the capacity and the equipment and the plant to do the particular job which he is [123] contracting, and the third thing is he must have, of course, capital.

Q. How long have you known Max J. Kuney, Sr.?

A. About twenty-five years.

Q. How long have you done business—surety bond business with the Max J. Kuney Company?

(Testimony of James M. Henry.)

A. We have handled all of the Max J. Kuney Company business for the past twenty years.

Q. When did you first find out about the Kuney family trusts and their relationship to the Kuney family partnership, Mr. Henry?

A. Off and on for a number of years. Max, Jr.—Max Kuney, Jr., and myself had discussed trusts of various kinds and phases.

Q. When? A. What?

Q. About when was that, if you recall?

A. The first time I knew about the family trusts was probably in the latter part of January, 1952. The reason I can recollect that is that over the period of years there was always a custom established by the Kuney organization that I come in some time right after the 15th of January and work out an insurance audit for the preceding year in order that they could close their books and get their financial statement to the bonding company and to the [124] various states that require the statement for license purposes. I can definitely recall this one because I was in Spokane making my annual audit when Max, Jr., showed me the tentative draft of this family partnership.

Q. Was this trust document signed, do you recall?

A. It was unsigned, as I recall. It was a rough draft.

Q. Did you or did you not notify all the surety companies you represent of the fact?

A. At that time there was one particular surety

(Testimony of James M. Henry.)

company that was underwriting suretyship for the Kuney organization, and it was discussed with them.

Q. And incidentally, how do you set up a bond when a company bids a job?

A. Well, most of that is worked out on this basis, when they file the statements with the companies as soon as they are published, and then from time to time as the project comes up, these matters almost always are discussed over the telephone, and we are given the authority to go ahead then and provide the necessary bonds for the contracts.

Q. How many companies, for instance, for the Kuneys would you be dealing with?

A. We only use one surety company for the prime contract. The surety itself then in turn sometimes would use as many as fifteen or twenty companies as re-insuring [125] organizations.

Mr. Harmon: I think that is all.

The Court: Cross.

Cross-Examination

By Mr. Biggins:

Q. Your last name is Henry?

A. That is right.

Q. I take it, sir, you first found out about this very clearly in your mind in January, 1952?

A. That was sometime between—after '51, between '51 and '52.

(Testimony of James M. Henry.)

Q. It was after that that you advised your underwriting companies about this?

A. That there was such a partnership set up, that is right.

Q. Because it was important?

A. That is part of it, and it was signed—our applications were always signed by the Kuneys, Max and his father as partners.

Q. But it is important to underwriting companies to know just who the partners are?

A. That is right.

Q. And also you advised the underwriting companies that Mr. Claggett was a partner, did you?

A. Oh, yes, a special partner. [126]

Q. What agreement—what partnership agreement did you see at that time that showed Mr. Claggett as a partner?

A. What was that?

Q. You said you saw the agreement?

A. I saw the trust agreement.

Q. Was Mr. Claggett's name mentioned thereon?

A. No.

Q. Where did you find out about Mr. Claggett?

A. Well, Mr. Claggett—knowing the organization, I knew that Mr. Claggett was a special partner.

Q. And still is?

A. And still is.

Q. Being close to the organization and knowing Mr. Kuney, you still know that?

A. As far as I know, unless it has been changed within the last four or five months.

Q. And being important knowing who the own-

(Testimony of James M. Henry.)

ers of the company are, Mr. Henry, you, of course, do subscribe to Dun & Bradstreet reports?

A. Oh, certainly.

Q. And when you read that report—you did get the 1953 report, you remember that?

A. I don't recall.

Q. You get it every year?

A. The company gets that, yes. I don't get them particularly. [127]

Q. When you got that report and when you saw the list under "partners," it was only Claggett—that Max J. Kuney, Jr., was a partner of Claggett and made no mention of the trust, and that surprised you, didn't it?

A. No, it didn't.

Q. You weren't subpoenaed from Boise?

A. What is that?

Q. You weren't subpoenaed by them to come over here?

A. No, sir.

Q. And you still have the insurance business?

A. Yes, sir.

Mr. Biggins: Thank you very much for coming all the way over here.

The Court: That is all, Mr. Henry. You may leave whenever you wish.

(Witness excused.) [128]

EDWARD A. COON

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Would you state your full name and spell your last name?

The Witness: Edward A. Coon, C-o-o-n.

Direct Examination

By Mr. Harmon:

Q. What is your address, Mr. Coon?

A. Spokane, Washington, 1215-19th Avenue.

Q. By the way, Mr. Coon, are you not here under subpoena?

A. I am here under subpoena.

Q. By whom are you employed?

A. By the Seattle-First National Bank in the Spokane and Eastern Branch.

Q. What position?

Q. I am a vice-president.

Q. In what department?

A. In the loan department, commercial loan department.

Q. And how long have you been employed in this capacity?

A. I have been in Spokane eleven years.

Q. Have you been in that position?

A. Yes, in that department all the time. [129]

Q. In your position as vice-president of the commercial loan department of the bank, have you

(Testimony of Edward A. Coon.)

had any occasion to do business with Max J. Kuney, Sr. or Jr., or Max J. Kuney Company?

A. I have.

Q. For how long?

A. Oh, more than ten years.

Q. Tell us briefly what your duties have been with respect to the loans made by the Max J. Kuney Company?

A. Well, I represent the bank in dealing with the Kuneys. I have handled their accounts, and credits are arranged through myself for the bank.

Q. Do you or do you not know much about the operations of the business in your job?

A. Well, that is my job to be acquainted with the Kuneys' affairs.

Q. Now, were you here yesterday, Mr. Coon?

A. No. Well, I came over on the airplane last night.

Q. You were not here in court?

A. Oh, no.

Mr. Harmon: Mr. Bailiff, will you show him Exhibits 1 and 2, the trust agreements?

(Whereupon, certain documents were handed to the witness by the Bailiff.)

Q. (By Mr. Harmon): Now, Mr. Coon, were copies of each of [130] those trusts signed by the Kuneys delivered to you or to the bank?

A. We have copies of each of these trust agreements.

Q. Do you recall exactly when you got them?

(Testimony of Edward A. Coon.)

A. Well, I first heard of the trusts in the early spring of 1952. I am sure that we had copies of the agreements before the end of the year 1952.

Q. During those three years, '52, '53, and '54, was the bank receiving annual statements from the Max J. Kuney Company?

A. That is right, absolutely.

Q. What was done with these financial statements when they were received?

A. Well, we would really scrutinize the statements and verifying all of the assets and also the liabilities. In fact, our credit, in addition to the responsibility of the management, was based on the financial statements.

Q. Did the statements or did they not clearly reveal the existence of this trust as partners in the family partnership?

A. The 1952 statement, December 31, 1952, statement indicates the trusts are listed there.

Q. Do you recall when they were signed by CPA's? A. They were.

Q. Would that mean anything to you? [131]

A. Well, I should say so. We would have insisted on them.

Q. What is the status of the Kuney Company account with the bank now? How much is owed?

A. Nothing is owed at the present time.

Q. When did you first meet me, Mr. Coon?

A. I can't recall whether it was last Wednesday or Thursday of last week.

Q. Did you at my request examine all of the

(Testimony of Edward A. Coon.)

bank records with respect to the Kuney account to refresh your recollection?

A. I sure did. You bet I did.

Q. Do you or do you not know how the Max J. Kuney Company handles its affairs with respect of the purchasing of equipment, supplies, and so forth?

A. Well, I am not sure that I know how you mean that. I think they buy where they can get the best price.

Q. No, I don't mean from whom, but cash or credit?

A. Oh, they pay for everything that they buy. I have never known them to buy anything on contract, it is always cash.

Q. Do either you or the bank have any interest at all in the outcome of this lawsuit?

A. Not at all.

Mr. Harmon: That is all.

The Court: Cross. [132]

Cross-Examination

By Mr. Biggins:

Q. May it please the Court, before the two questions which I do have to ask, I should like to clarify, and implying no impropriety at all, you did state you were subpoenaed to come over here?

A. That is true.

Q. May I inquire, where did you get your subpoena?
A. In Seattle.

Q. I see. You came over here voluntarily to get

(Testimony of Edward A. Coon.)

the subpoena? A. That is true.

Q. Your answer before wasn't complete, then, was it? Let us put that at rest, your answer before was not complete, was it?

A. I thought I answered the question.

Q. All right. Now, I was a bit perplexed, you did say they purchased everything by cash?

A. To the best of my knowledge.

Q. But yet the bank loaned them money? They loaned them money for what?

A. Well, for purchases.

Q. I see. A. For payrolls.

Q. So I may be clear on that, you have made periodic credit [133] investigations of this company? A. I should say so.

Q. And you do loan money to them?

A. That is true.

Q. And you accordingly know that the partnership has pledged and/or made available to the corporation its fixed assets? A. That is right.

Q. One last question. Please think carefully and try to recall back the 1952 financial statement which you said you examined. A. Yes.

Q. You said on that financial statement it indicated that these kids were partners, these trusts?

A. That the trusts were set up.

Q. Think back carefully and accurately and precisely. Isn't it true that the word "partnership" was never used on that financial statement and it simply said, "Max J. Kuney and trusts" under the

(Testimony of Edward A. Coon.)

liability and capital account? That is really what you meant to say, wasn't it?

A. No, I don't believe so.

Q. Do you have the financial statement with you now, sir, that showed them as partners and not capital accounts, sir, not capital accounts, as partners of the business? [134]

A. Well, that was my understanding.

The Court: No, that isn't the question he asked you. He asked, do you have the financial report that shows that?

The Witness: No, I don't think so.

Mr. Biggins: That is all. Thank you.

The Court: You are excused.

Mr. Harmon: Could I have a question on re-direct examination?

The Court: Yes.

Redirect Examination

By Mr. Harmon:

Q. Mr. Coon, why did you insist on being subpoenaed?

A. That is the custom of our bank and when you are speaking for the bank, to be subpoenaed.

Q. The inference that you are here voluntarily is not true?

A. That is right. In fact, I was told I would be subpoenaed in Spokane.

Mr. Harmon: Will you show him Exhibit 30, please?

(Testimony of Edward A. Coon.)

(Whereupon, a certain document was handed to the witness by the Bailiff.)

Q. (By Mr. Harmon): Turn to Page 14, please, Mr. Coon. A. Yes. [135]

Q. The last subhead on that page, would you read it, please?

A. The capital account—the partners' source of 1952 profit and net worth.

Q. And what are the partners shown underneath that heading?

A. Oh, well, the partners would have been Max J. Kuney and child, Max Kuney, Jr., and children, Lloyd W. Johnson and children, and C. S. Greene.

Q. And Max J. Kuney and child and Max J. Kuney, Jr., and children, did that clearly mean to you these trusts?

The Court: Well, it has not been shown that this witness ever had these income tax returns at the time.

Mr. Harmon: This is not an income tax, if your Honor please.

The Court: It is listed so on the exhibit list.

The Witness: No, this is the audited statement.

Q. (By Mr. Harmon): Would you turn to the front of Exhibit 30 and read and tell us what it is?

A. Exhibit what?

Q. Thirty.

A. That is the Max J. Kuney Company financial statement.

The Court: Very well.

(Testimony of Edward A. Coon.)

Q. (By Mr. Harmon): That is the document you were testifying [136] about? A. Yes.

Q. You said you got it at the end of the year and it revealed the existence of the trust?

A. That is right. We have these back for many years, for I don't know how many years, but back past '52.

Q. And this language on this page is what you are referring to? A. That is right.

Q. Under the heading "Partners' Source of Profit"? A. Yes.

Mr. Harmon: That is all.

The Court: Do you have any further questions?

Mr. Biggins: I certainly have.

Recross-Examination

By Mr. Biggins:

Q. You do have a background in accounting and finance, we may be sure? A. That is right.

Q. And we know there is a great distinction between "profit distribution" and "capital account," we do know that? A. That is true.

Q. Now, on Exhibit 30, which is before you, sir, the very first page of the general statement, which would be Page 2, [137] do you see the line "the partners"? A. Yes.

Q. "Max J. Kuney, age 58, and Max J. Kuney, Jr., age 34, are equal partners and general partners in all divisions."

May I skip down now to the heavy construction

(Testimony of Edward A. Coon.)

division, "Max Kuney, Jr., manages the heavy construction division in Spokane and Max J. Kuney with special partners Johnson and Greene manages the three other divisions in Seattle."

A. Yes.

Q. Did you know at that time that Mr. Claggett was a partner in the heavy construction division, as was testified by Mr. Henry? Did you know that?

A. I didn't in 1952.

Q. And you still don't know, do you?

A. Oh, yes.

Q. He is still a partner?

A. I know he is a partner now unless there has been a change.

Q. You were never sure when things were changed over there?

A. Yes, I think that we are.

Q. So I will ask you again, sir, is Mr. Claggett still a partner?

A. To the best of my knowledge he is, and he was indicated [138] to be a partner in the December 31, 1959, statement.

Q. A partner in the family partnership, you are clear what I am talking about?

A. Well, no.

Q. Partner in what?

A. A partner in the Max J. Kuney Company.

Q. The corporation?

A. The operation.

Q. Do I understand you to say that corporations have partners, a man so sophisticated in finance as you?

A. No.

(Testimony of Edward A. Coon.)

Q. What was he a partner in that you understood?

A. Well, he was a partner in the profit.

The Court: In the what?

The Witness: In the profits.

The Court: A partner in the profits?

The Witness: Yes, of the operation.

Q. (By Mr. Biggins): His name did not appear on this financial statement of which you are speaking, though, did it?

A. No, I didn't see it there.

Mr. Biggins: That is all.

The Court: That is all, Mr. Coon. You may leave whenever you wish.

(Witness excused.) [139]

HAROLD V. BOWEN

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined, and testified as follows:

The Clerk: State your full name and spell your last name.

The Witness: Harold V. Bowen, B-o-w-e-n.

Direct Examination

By Mr. Toole:

Q. Where do you reside?

A. Spokane, Washington.

Q. What is your occupation?

A. I am a certified public accountant.

Q. What is a certified public accountant?

(Testimony of Harold V. Bowen.)

A. Well, he is an independent public accountant that is registered or certified by the state after passing an examination.

Q. Did you have to take an examination?

A. Yes.

Q. Where did you get your formal training and study?

A. Mostly through correspondence in accounting. I took economics in college.

Q. Is there any higher degree or designation of accountants than certified public accountant? [140]

A. No.

Q. Where have you worked since you have become a certified public accountant—when was that?

A. In 1946.

Q. Where were you working in 1946?

A. In Cheyenne, Wyoming.

Q. And in later years generally where?

A. Well, in Denver and Spokane.

Q. Did you have a number of contractors as clients?

A. Yes, at all times.

Q. When did you come to Spokane?

A. In 1952.

Q. With whom are you associated in Spokane?

A. Morris & Lee.

Q. What are Morris & Lee and Company?

A. Certified public accountants in Spokane.

Q. What was your position with them?

A. I was staff accountant, senior accountant.

Q. What does that mean?

A. Well, I was mostly in charge of work—in charge of most of the work that I did. In other

(Testimony of Harold V. Bowen.)

words, I wasn't working under the supervision of anyone but the partners of the firm.

Q. While working for Morris & Lee did you have occasion to perform services for Max J. Kuney Company? [141] A. Yes.

Q. About when was the first time you did some work for them?

A. I think probably it was about August or September of 1953.

Q. What occasioned your going and performing services for them?

A. Well, as I recall, at the inception it was because of the formation of the corporation. They asked me to assist in that. That is in the book—the accounting part of it.

Q. Were you an employee of Max J. Kuney Company? A. No.

Q. Just what was your relationship?

A. I had no relationship whatever with Max J. Kuney Company. The firm—the Max J. Kuney Company had employed the firm, and I was to do the work independently.

Q. Is the relation somewhat like a man who would hire a lawyer, the lawyer is not an employee of the man? A. Yes.

Q. From that time forward have you had occasion to examine the books of Max J. Kuney Company? A. Yes.

Q. How often do you examine the records of Max J. Kuney Company? [142]

A. Every year.

(Testimony of Harold V. Bowen.)

Q. How long were you acting in that capacity as a staff member of Morris & Lee?

A. Until 1958.

Q. What happened in 1958?

A. I left Morris & Lee and went into a partnership of my own.

Q. What is the name of that partnership?

A. Cole and Bowen.

Q. And that is a firm of certified public accountants?

A. Yes.

Q. Cole-Bowen and Company represent or do work for a number of contracting firms?

A. Yes.

Mr. Toole: Would the Bailiff please hand the witness Exhibit 32.

(Whereupon, a document was handed to the witness by the Bailiff.)

Q. Exhibit 32 is the financial statement of Max J. Kuney Company for the year ending December 31, 1954?

A. Yes.

Q. Would you read the certificate at the bottom of the page for the benefit of the jury?

A. "We have examined the accompanying consolidated balance sheet of Max J. Kuney Company, general partnerships; its [143] affiliated operating corporation, Max J. Kuney Company, Inc., and its partnership operating divisions as of December 31, 1954. Our examination include verification of the cash accounts, contract and commercial accounts receivable, notes receivable, and accounts and notes payable. We reviewed in detail all other balance

(Testimony of Harold V. Bowen.)

sheet accounts to the extent considered necessary in the circumstances.

In our opinion the accompanying consolidated balance sheet and related schedules and footnotes present fairly the financial position of Max J. Kuney Company at December 31, 1954, in conformity with generally accepted accounting principles applied on a basis consistent with the preceding year."

Q. Would you read the caption at the top of that certificate?

A. "Certificate of Independent Certified Public Accountant."

Q. What do you mean by "independent" in that statement?

A. Well, you are unbiased, uninfluenced by any other party, completely independent.

Q. Who signed that particular certificate?

A. Well, this certificate was prepared while I was with Morris & Lee and signed by L. Gordon Lee.

Q. Who did the work? A. I did the work.

Q. And you have examined the books every year since then? [144] A. That is right.

Q. What person in your opinion knows the most about the books of Max J. Kuney Company and related organizations? A. I do, unquestionably.

Q. Do you know more about the books than either Mr. Kuney, Sr., or Max, Jr.?

A. Yes.

Q. What do you mean by "consolidated statement" as stated in that certificate?

(Testimony of Harold V. Bowen.)

A. Well, the balance sheet is consolidated—consolidated balance sheet means that it is the—that all the entities involved, the Max J. Kuney Company Corporation, the partnership, and the operating partnerships that were in Seattle, all consolidated in one statement, and the entire company account would be eliminated in the statement.

Q. Is this a common concept in the public accounting field? A. Yes.

Q. For related organizations?

A. Yes, very common.

Q. Are you familiar, Mr. Bowen, with the total amount of income for the years 1952, '53, and '54, which the government—correction, total amount of income for those three years earned by the trusts which the government is seeking to tax in this lawsuit—I misspoke [145] myself. Strike the question.

Are you familiar, Mr. Bowen, for the years 1952, '53, and '54, with the amount of income earned by the trust which the government contends should be taxed to the adult Kuneys? A. Yes, I am.

Q. Approximately just what is the total amount of that income? A. \$111,000.

Q. Directing your attention, Mr. Bowen, to January 1, 1955, on that date how much money did the two Kuneys and the two trusts have invested in the partnership? A. Well, also the children.

Q. These figures on the blackboard are approximate—and also including the investments of the two children representing the distribution of income made in the year 1952?

(Testimony of Harold V. Bowen.)

A. Approximately \$1,325,000.

Q. That is this figure right up here (indicating)?

A. Yes.

Q. This is the total investment of the partnership?

A. Yes.

Q. Now, what was the portion of the capital of the money invested in fixed assets—not portion—how much of this total capital of \$1,325,000? [146]

A. Well, it would be \$305,000 plus \$250,000 or \$555,000.

Q. That is the sum of these two figures (indicating)?

A. Yes, it is.

Q. The sum of these two figures for a total of \$555,000?

A. Yes.

Q. You testified that it represented the investment in the fixed assets?

A. Yes.

Q. How much money did the adults have invested in fixed assets of this partnership?

A. \$305,000.

Q. And how much money did the trusts have invested in the fixed assets?

A. Approximately \$250,000.

Q. What do we mean by this caption, "Surplus Capital"?

A. That is capital invested in the partnership in excess of the amount invested in fixed assets.

Q. Who owned the surplus capital over the amount invested in the fixed assets?

A. Primarily the adult Kuneys; the children also.

Q. How much did they own?

A. \$740,000.

(Testimony of Harold V. Bowen.)

Q. Approximately? A. Approximately.

Q. And the children individually owned approximately what? [147] A. \$30,000.

Q. Now, you were here yesterday and heard the testimony of Max Kuney, Sr., with respect to the withdrawal of the capital stock from the partnership? A. Yes, I was.

Q. Who owned the capital stock—or rather whose money was invested in this capital stock in this partnership?

A. I don't know—at the inception the stock was owned by the partnership.

Q. But was it included in the surplus capital?

A. Oh, yes, with the children's money all invested in fixed assets, and obviously the corporate stock investment was included in the surplus capital of the adult Kuneys. It had to be.

Q. Now, when the corporate stock—Strike that. How were the rental income profits received by the partnership divided between the partners?

A. They have always been divided on the basis of capital investment.

Q. Capital investment in what?

A. Well, prior to the 1955 total capital investment in—and beginning in 1955 in the fixed assets.

Q. And referring to January 1, 1955, and to the figures on the blackboard, what percentages were used in the year 1955 for the division of rental income earned by the [148] partnership?

A. Well, 56 per cent of the total rental income

(Testimony of Harold V. Bowen.)

would have gone to the adult Kuneys, and 44 per cent would have gone to the trusts.

Q. Now, when the corporate stock was withdrawn from the partnership, did that affect the investment of the partners in the fixed assets?

A. No, it did not.

Q. What effect did the withdrawal of the capital stock have on the ratio in which rental income earnings were shared?

A. It didn't have any effect on the ratio of rental income. It reduced the capital equities of the adult Kuneys.

Q. From what?

A. From \$740,000 to \$340,000.

Q. Approximately? A. That is right.

Q. Did the withdrawal of the corporate stock reduce the investment of either the adults or the trusts in the fixed assets? A. No.

Q. Did the withdrawal of the corporate stock affect in any manner the share of profit from rental income earned by the trusts?

A. No, it did not. [149]

Q. Did the corporate stock pay any dividends?

A. No.

Q. Has it ever paid dividends?

A. No, it has not.

Q. Now, you were here in court yesterday and heard Mr. Kuney, Sr., testify? A. Yes.

Q. And you heard the reference to the "Bible"?

A. Yes.

Q. Have you reviewed each of the entries in

(Testimony of Harold V. Bowen.)

the Bible? A. Yes, I have.

Q. Every one of them? A. Yes.

Q. Do you understand every entry in the Bible?

A. Well, I did at one time. I can't remember all of them now. I reviewed them all carefully at the time I was doing the work, yes.

Q. And given an adequate opportunity can you refresh your recollection? A. Yes.

Q. Are there any adjusting entries in the Bible which are contrary to sound accounting practices?

A. Not that I know of. I am sure there wasn't, or I would have disclosed them at one time or another.

Q. Are there any entries in this Bible which are inimical [150] or unfair to the trusts?

A. No.

Q. Now, yesterday you saw Mr. Biggins write some percentages on the blackboard, and with respect to the division of profit for the year 1955, as I recall, Mr. Bowen, didn't he say that the Bible showed that Max Kuney, Sr., was to get 33.66 per cent of the profit—correction—that the trust for Johnnie was to get 33.66 per cent of the profits?

A. Yes, I believe that is correct.

Q. And Max, Sr., was to receive 16.99 per cent of the profits? A. Yes.

Q. You do recall that testimony?

A. I recall that.

Q. Do you recall that later on amended income tax returns were filed, as pointed out by Mr. Biggins, in which the percentages were changed? Do

(Testimony of Harold V. Bowen.)

you recall that? A. Yes.

Q. I don't recall the exact percentages. They were erased before I noted them down.

A. Well, they are approximately the ones that are on there now.

Q. Approximately these percentages (indicating)? A. Yes. [151]

Q. In total? A. Yes, that is in total.

Q. Who prepared that amended income tax return that had the different percentages on them?

A. I did.

Q. Are you familiar with the reasons for the change from percentages of division in the Bible to the percentage of division on that amended income tax return subsequently filed?

A. Yes, I am.

Q. Would you describe to the jury why that change was made or what occasioned it?

A. Well, the principal reason for the change was because in the Bible the total amount of fixed assets that was used in determining these percentages did not include some property that was in California and which had been sold about the time the Bible was prepared. But it was on hand at the beginning of 1955 and at the beginning of 1956, and since that was a part of the fixed assets, when I prepared the amended returns, it was necessary for me to go back and revise the figures in the Bible and include that California property in the fixed assets, which greatly changed the percentages. But since the agreement was to divide the profits on the basis

(Testimony of Harold V. Bowen.)

of fixed assets, we had to, of course, include all [152]
the fixed assets.

Q. Was the California property actually on the books at the beginning of 1955?

A. Oh, yes, it was on the books.

Q. Was there anything more involved than an arithmetical error in adding the fixed assets?

A. No, absolutely not. That is all it was.

Q. Did Mr. Kuney have anything to do with changing the ratios?

A. No. I doubt if he even knows it now.

Q. Who did compute these change ratios?

A. I did.

Mr. Toole: You may inquire.

The Court: Cross-examine, please.

Cross-Examination

By Mr. Biggins:

Q. May it please the Court, Mr. Bowen, so we may understand each other with some precision in accounting as we proceed here, may I inquire, sir, what standard reference books you consider authoritative for general accounting principles?

A. Well, there is a great many of them.

Q. The ones which you use in your practice, sir.

A. Finney is used quite a bit. [153]

Q. Finney, I believe, sir, is a college book and not a professional man's reference book. Do you mean the new edition by Finney with Miller or the old edition?

(Testimony of Harold V. Bowen.)

A. Well, of course, our generally accepted accounting principles.

Q. I am asking about Finney, sir. Are you talking about the new edition with Miller or an old edition?

A. Well, I don't really recall.

Q. You don't recall?

A. No.

Q. All right. Again, sir, what general reference books in accounting do you consider authoritative and use in your practice?

A. Montgomery on Auditing, The American Institute of Accountancy, and the CPA Handbook is used extensively.

Q. What handbook?

A. The American Institute of Accountancy, CPA Handbook.

Q. I think, sir, that the American Institute put out no handbook.

A. Oh, yes, they do.

Q. An accounting handbook is published by the Ronalds Press, second and third edition?

A. The American Institute also has a CPA handbook which defines——

Q. (Interposing): They are research bulletins, and Mr. Miller [154] put out the handbook?

A. No, absolutely not, there are two volumes. The CPA Handbook, I am sure that any CPA would know of.

Q. We are clear that Paton's Handbook is authoritative?

A. Yes.

Q. And Wixon's Joint Handbook of the same press is authoritative?

A. Yes.

(Testimony of Harold V. Bowen.)

Q. The American Institute Research Bulletins both on general accounting and auditing?

A. Right.

Q. Now, the American Institute's Certified Public Accountant's name has been changed?

A. Yes.

Q. And in auditing we accept Montgomery?

A. Yes, we use Montgomery almost entirely in auditing.

Q. He has now passed away, but his book is still in effect?

A. Yes.

Q. Now, we were speaking, I believe, in the beginning, Mr. Bowen, about the certificates you put on the 1953 and the 1954 financial statements. We were speaking of that?

A. Yes.

Q. Now, this is not what we call an unqualified CPA certificate, is it? [155]

A. Which ones are you talking about?

Q. Exhibits 32 and 33. Please examine your certificates.

(Whereupon, there was a brief pause.)

Q. My pending question, Mr. Bowen, is, this is not an unqualified CPA certificate, is it?

A. The 1953 particularly isn't, but——

Q. My question, Mr. Bowen, this is not an unqualified CPA certificate, is it?

The Court: Please answer precisely the question.

A. No.

Mr. Toole: Which one?

(Testimony of Harold V. Bowen.)

Mr. Biggins: 32 and 33.

Q. (By Mr. Biggins): I shall try to be precise in my questions. A. Okay.

Q. Now, you did certify, however, that these statements were prepared in accordance with generally accepted accounting principles applied on a basis consistent with the preceding years? You did say that? A. That is right.

Q. After the Bible came out—after some of these other changes came out, could you still put in your certificate, Mr. Bowen, that it had been applied in sound accounting principles consistent with the preceding year? [156] A. Yes.

Q. Go ahead.

A. You will notice that it is a consolidated statement. Those figures are all intercompany accounts which does not affect the total consolidated position at all. If the corporation pays rent to the partnership, in the consolidation it is eliminated.

Q. I am quite aware, Mr. Bowen, what you mean by a consolidated statement.

A. So actually you wouldn't change the financial position any if the corporation paid the partnership rent or interest or any of those intercompany accounts, and it would not affect the consolidated financial position at all.

Q. My question then is a simple one—before we get to that, this much is clear, Mr. Bowen, if we use the sound accounting principles with a clear partnership agreement understanding, there is no need to change the amount of income—strike that.

(Testimony of Harold V. Bowen.)

If we have a clear partnership agreement, and if we apply sound general accounting principles, it is possible for a competent CPA, such as you, to determine the amount of income shortly after the close of the fiscal year? That is possible, isn't it?

A. Generally speaking, it is. [157]

Q. Was that true in this case?

A. In some of the years it wasn't, I don't believe, as between the related entities.

Q. And the reason was not a lack of clarity or the definition of the accounting principles to be applied?

A. No.

Q. The ambiguity was the instructions to come from Mr. Kuney? Please don't fence with me, Mr. Bowen. That is true, isn't it?

A. I don't quite agree that it had to come from Mr. Kuney. I can't see where that has anything to do with it.

Q. It didn't come from you, sir, I submit?

A. I think that——

The Court: Answer the question each time.

A. I didn't.

The Court: The question is did, the ambiguity come from you?

The Witness: No.

The Court: All right.

Q. (By Mr. Biggins): Now, you say, I take it, sir, that you are more familiar with the books of account over there than anybody else?

A. I think so.

Q. And, of course, he asked about Mr. Kuney,

(Testimony of Harold V. Bowen.)

Jr., and Mr. Kuney, Sr. How about Mr. Peterson?

What is Mr. Peterson's [158] job?

A. He is the office manager.

Q. And what is his corporate title?

A. Secretary.

Q. And also anything else? Has he been considered since you have been dealing with the company as also, perhaps, treasurer?

A. I think so, yes. I am not absolutely sure.

Q. And although he has been treasurer of the company, you still know more about it than he does?

A. I think if it came to—I think if it was a matter of reviewing the books and analyzing the capital accounts and various things like that, I do, yes.

Q. Did you prepare any of the original vouchers on the adjusting entries? A. No, none.

Q. Did Mr. Peterson prepare some?

A. Yes, he prepared all of those.

Q. And do you know more about the adjusting entries that he prepared than he does? I take it that is your testimony now?

A. No, I didn't say I knew more about the details of the posting of the books. I said I knew more about——

Q. (Interposing): I didn't ask about the posting, I asked about the vouchers for the adjusting entries. [159] A. No.

Q. Is Mr. Peterson over here if I should have questions to ask him?

A. I don't believe he is, no.

(Testimony of Harold V. Bowen.)

Q. You are the one who came over?

A. Yes.

Q. I should like to inquire in detail about the Bible, but before I do, there is something here I would like to put to rest and come back to later, if I may.

Now, as a certified public accountant, Mr. Bowen, I believe you did testify that—and may I put a double line here—did you put this on the black-board, Mr. Bowen?

A. No, two of us together.

Q. I will put the double lines and the dollar signs here. A. Yes.

Q. \$1,325,000 represents what?

A. The total investment in the business.

Q. All right. Total investment.

What was your understanding was the agreement—what were you told was the understanding as to the manner in which profits were to be distributed to Mr. Kuney and the trust? What were you told?

A. That they were to be distributed on the basis of investment. [160]

Q. All right. Now, Mr. Kuney, Sr., and Mr. Kuney, Jr., have how much here?

A. \$740,000.

Q. May I add that here. One million forty-five, is that correct? A. Yes.

Q. That is their total investment?

A. Yes.

Q. Now, the children have how much?

(Testimony of Harold V. Bowen.)

A. \$250,000.

Q. And may I add this?

A. Plus thirty thousand.

Q. Two hundred eighty thousand dollars. That is their total investment?

A. Yes.

Q. Now, we have established that the earnings were going to be distributed in accordance with the total investment, didn't we? We established that just three questions ago, didn't we?

A. Yes.

Q. Now, it is clear to you that the amount in the surplus capital account of the adults is determined by they, themselves? That is clear, isn't it? Are you familiar with the chart of accounts?

A. Yes. [161]

Q. And this is marked on the books as "personal account," isn't it?

A. Yes.

Q. And it is treated as a personal account by Mr. Kuney and his son, Junior?

A. Yes.

Q. All right. But this personal account from an accountant's point of view is considered here as part of the invested capital?

A. Yes.

Q. But when we compute a profit to be distributed in 1955, as you indicated here, we did not include this amount in the rent to be charged, did we?

A. No.

Q. This '56 per cent is only on the basis of \$305,000?

A. That is right.

Q. And if we added this seven hundred and forty over here to get the million, it would be much, much greater, wouldn't it?

A. Yes, it would.

Q. And as far as you know as an accountant,

(Testimony of Harold V. Bowen.)

sir, they can change the amount of their personal account at any time? A. That is right.

Q. Now, then, we are talking about the surplus capital of the children, this thirty thousand? Are you with me, sir? [162] A. Yes.

Q. You know what that represents?

A. Yes.

Q. And it represents the distributions made by the trustee? A. That is right.

Q. And the distributions made by the trustee are Max, Sr., and Max, Jr.? A. Yes.

Q. And so they have completely in their control the ability at any time to determine what this amount may be (indicating)?

The Court: When you say "this," what do you mean?

Q. (By Mr. Biggins): The so-called surplus accounts. A. I don't see——

Q. I will start out easier.

A. I don't understand the control part of it.

Q. We did start out with a trust corpus, did we?

A. Yes.

Q. To which the earnings came in, as we talked about the computations? A. That is right.

Q. You have examined the trust instruments?

A. Yes.

Q. Now, money or distribution from the trust itself can be [163] made to the personal account of the children at any time in accordance with the trust instrument, you do understand that?

A. Yes.

(Testimony of Harold V. Bowen.)

Q. And having read the trust instruments, you also understand that Mr. Kuney can take it out of a trust at any time and put it over here (indicating), do you understand that? A. Yes.

Q. And Max Kuney can take it out of the trust any time and put it over here (indicating)?

A. Yes.

Q. And by that discretion, they do directly control in a way what this percentage (indicating) will be, don't they? A. They do.

The Court: Well, that is the point, that is the question, they could if they chose to exercise it?

The Witness: They could, yes.

Q. (By Mr. Biggins): We are also clear this was their personal account (indicating)?

A. Yes.

The Court: Please, when you say "this"—

Q. (By Mr. Biggins): This surplus capital account, being [164] the \$740,000? A. Yes.

Q. Which they completely control as far as you know as an accountant? A. Yes.

Q. By controlling that, that fixes this percentage (indicating) at any time, that percentage can be determined any time depending on what they do on their personal account, that is true, as an accountant?

A. Not since the beginning of 1955.

Q. I didn't say what they did at this point. I said what they can do? A. Yes, that is right.

The Court: The question is what they have the power to do, not what they did. Do you understand that?

(Testimony of Harold V. Bowen.)

The Witness: Yes.

The Court: Now answer the question.

The Witness: I answered it yes.

Q. (By Mr. Biggins): All right. Now I will speak and address my attention for a moment, sir, about what they did do. We are clear on what they did do? You did take down my percentages? Did you have a chance to check, them, I take it?

A. Yes. [165]

Q. You found no inaccuracy in what I put on the blackboard? A. No.

The Court: Do you mean on the blackboard yesterday?

Mr. Biggins: Yes, yesterday.

Q. (By Mr. Biggins): And so, I take it—please, sir, my questions, will you understand they are one accountant to another. I am talking in accounting language. Your language I know, sir, and I certainly hope you know mine.

And before I do, let us put this very small point at rest, you did not prepare—you did take care of the accounting of this firm for a number of years by audit? A. Yes.

Q. Your firm did not prepare the 1953 income—original 1953 income tax returns? A. No.

Q. Or the 1952 income tax returns?

A. No.

Q. Or the 1954 income tax returns?

A. No.

Q. And you didn't even prepare the original 1955 income tax returns?

(Testimony of Harold V. Bowen.)

A. No, that is right. [166]

Q. Or the original 1956 returns? A. No.

Q. Who did prepare those?

A. Those were prepared by the company.

Q. I see.

A. But in all cases they were reviewed by me and checked, except for 1952 and '53, when I wasn't doing the work.

Q. And, of course, it is the usual professional practice when an independent CPA reviews and verifies the tax returns, to put their stamp certificate on it? A. I don't think if you review it.

Q. There are three certificates that an accountant can put on a tax return? You are aware of that?

A. Yes.

Q. Which one did you put on these tax returns?

A. What do you mean, three certificates on a tax return? We don't put any certificates——

Q. There is a certificate at the very lowest level prepared on the basis of information furnished?

A. Yes, but those don't have to be put on tax returns. I think most accountants don't put them on there. At least, it isn't the practice in our area to put any statement on a tax return.

Q. If you make a full audit of the corporation, including the preparation of the return, may I ask, Mr. Bowen, do [167] you put the imprimatur of your firm on it?

A. Yes, we just put the name of the firm. If we prepare the return, we sign it and put our stamp on it, but that doesn't any qualifications at all.

(Testimony of Harold V. Bowen.)

Q. Addressing your attention, if I may, then, to 1955, you are aware that in the original returns as filed—the original tax returns——

A. Yes.

Q. I am taking Max Kuney, Sr., only, may we also understand that? A. Yes.

Q. That on the original return his share of the understanding was that Max, Jr., and Max, Sr., split the profits, isn't that right, fifty-fifty each?

A. Yes, that is right.

Q. Now, no matter what the capital account of Senior and Junior, they always split their half even? That is what you understood?

A. That is right.

Q. And after they got their half, then this other agreement came into operation how they would split it with their trust? A. Yes.

Q. You so understood that? A. Yes. [168]

Q. And so what Max, Sr., got personally added to what his trust for John R. got would always total fifty per cent, wouldn't it? A. Yes.

Q. And in the original 1955 return, he got 41.6 per cent of the income and his trust for John R. was 8.84 per cent? A. Yes.

Q. All right. Now, in the Bible, and you said you were familiar with the entries in the Bible and the figures I put on the blackboard yesterday?

A. Yes.

Q. All right. This is Senior, this is John R. (indicating). Now, in the Bible—on this Bible, may we be clear on this, too, the Bible is not a book of

(Testimony of Harold V. Bowen.)

Genesis defining things from the beginning, the inception of this partnership at all?

A. No, it is not, that is right.

Q. Now, in the Bible, Senior goes down to 16.99?

A. Yes.

Q. And the son's, John R.'s, goes up from 8.84 up to 33? A. Yes.

Q. 33.66? A. Yes.

Q. In the beginning Senior had almost five times as much income as John R.? [169]

A. That is right.

Q. But the time we come to what the Bible says, we got about twice as much for John R. as we have the father? A. Yes.

Q. And then we have your amended returns for 1955, and I believe on your amended return, if we computed it right, it is 28.01, which is my figure, Mr. Bowen? A. That is correct.

Q. Which would be approximately right?

A. Yes.

Q. And I have for John R. 22.42, which, if we divide it, he has approximately half of this?

A. Yes.

Q. So that is right, isn't it?

A. Yes, that is right.

Q. So now we have—going back again, the father has five times as much as John R., he has got half as much, and now he has got about fifty per cent more. That is what the history of this transaction on these shows? A. Yes, that is right.

Q. Now, please listen to this question carefully, I do request some precision of answer, if the invest-

(Testimony of Harold V. Bowen.)

ment—if this investment—is a true and correct figure (indicating)?

The Court: You must use the figure [170] because the record will not reflect what “this” is. We all see what it is, but the record does not.

Mr. Biggins: I always caution the witness, and yet I make the same mistake myself.

Q. (By Mr. Biggins): You have no doubt this figure is right (indicating)? It is an approximate figure within a few thousand dollars.

The Court: The figure referred to is \$1,325,000. All right.

Q. (By Mr. Biggins): Now, assuming that is right, we must then also assume here that the children had a 44 per cent interest, as you had put up here (indicating)?

A. That 44 per cent is only of the fixed assets. The 44 per cent represents the percentage of their investment in the total amount of fixed assets only, not in total.

Q. Let me ask the question, assuming this (indicating) remains constant——

The Court: Please use the figure.

Q. (By Mr. Biggins): ——\$305,000, then these percentages (indicating) should remain the same?

A. Yes.

Q. Now, if the parents in fact have a 56 per cent interest in \$305,000, and the children have a 44 per cent in the \$250,000—are you with me [171] so far? A. Yes.

Q. Let us assume we made a mistake there and found there was a \$305,000 property down in San

(Testimony of Harold V. Bowen.)

Francisco which we all forgot about, an identical amount—are you with me? A. Yes.

Q. We add that back in—— A. Yes.

Q. And when we add this back in, the adults still have 56 per cent interest, don't they?

A. No.

Q. They don't?

A. No, their percentage then would change.

Q. Why?

A. If the total there now is \$555,000 for the two, but if there was another three hundred thousand added to the total fixed assets, then it would increase the total and change the percentages.

Q. All right. Now, on that point, you were here yesterday and heard Mr. Max, Sr., testify that they were trading in some of these equipment and fixed asset accounts? Did you hear that testimony?

A. Yes.

Q. All right. And by whatever he did in the purchase or sale of those fixed assets, it was controlled by the [172] amount of this figure (indicating)—it affected it, didn't it?

A. Yes, it would affect it, yes.

Q. And depending on what he did there would affect what the percentages are here (indicating)?

A. Yes, it would.

Q. And who did control the sale and exchange of fixed assets?

A. I think that is dictated by business circumstances.

The Court: What individual decided what the circumstances were?

(Testimony of Harold V. Bowen.)

The Witness: I suspect that both partners, Max Kuney, Jr., and Max Kuney, Sr.

Q. (By Mr. Biggins): Now, in looking at these 1955 figures, if I may, Mr. Bowen, I notice that Senior's assets in percentage here of 41 goes down to 16.99? A. Yes.

Q. I take it what happened here is the sudden loss of some assets, and that is why the percentage change? A. No, that isn't it at all.

Q. But when we go from 16.99 up to 28, we suddenly found some other assets?

A. Just one, the property in California.

Mr. Biggins: If the Court please, before my next battery of questions, which will be the [173] so-called "Bible," I would like to organize and have the witness refresh his recollection.

The Court: Yes, all right, we will take the morning recess at this time.

(Whereupon, a short recess was taken.)

The Court: Proceed, please.

Q. (By Mr. Biggins): May it please the Court, I believe you have on the stand available and before you, Mr. Bowen, Exhibit G, which we do refer to as the "Bible," don't we? A. Yes.

Q. Now my first three questions generally, and if you would care to examine page 2 where I have put the bookmark—do you see the letter of March 1, 1957? A. Yes.

Q. You do see the signatures at the end of that letter? A. Yes.

(Testimony of Harold V. Bowen.)

Q. And that the signatures were notarized on page 5? A. Yes.

Q. And if you care to examine this letter, sir, before you answer my questions, it is true, and Mr. Kuney told you, that the Kuney family partnership was formed by the two adult Kuneys to reduce their income taxes while living and to save inheritance taxes at their death, that is true, [174] isn't it? A. That is what it says.

Q. And they told you, sir? You were so advised?

A. No, they didn't tell me because I wasn't even there when they formed the trust.

Q. You use the Bible, don't you? A. Yes.

Q. And you were advised, at least in writing that the Kuney family partnership was formed by the two adult Kuneys to reduce their income taxes while living and to save inheritance taxes at their death?

A. I repeat, that is what it says in here.

Q. And you were given this to use?

A. Yes.

Q. All right. And it is also true that they told you that so long as Mr. Kuney, Sr., was living and Mr. Kuney, Jr., was living, both intended to continue to act as trustees during their lifetime? A. Yes.

Q. All right. Now, our next question is about the formation of this corporation and who owned it, Mr. Bowen, so we can lay that at rest, and before I ask the question, I invite to your attention the language on Page 2 at the bottom,

"The Kuney Family Partnership capital was invested entirely in fixed assets consisting of [175] equipment, machinery, land, and buildings held out

(Testimony of Harold V. Bowen.)

of the corporation in 1953 for the main reason: The corporation, with W. R. Wiginton and W. B. Peterson holding their agreed 20 per cent interest, would live on and be a reliable caretaker and user of such fixed assets after the adult Kuney's would die and would provide a steady and carefree income to their widows and the trusts for their children by paying them for the use of such fixed assets."

Now, I invite your attention also to the next bookmark which I have placed in there, Mr. Bowen, which is, may we call it, a journal entry on journal voucher two, sir. Do you see it there, or could I help with it, June first, 1953? Journal voucher two?

These are accounting journal entries, are they not? A. Yes.

Q. And above the one I invited your attention to, we see typing across "MJK" and below we see the same typing, "MJK." What does that mean?

A. That indicates the journal voucher was prepared by Max J. Kuney.

Q. Senior or Junior?

A. Presumably, Senior. [176]

Q. Now, this journal voucher entry to an accountant on the basis of this journal entry, what does the debit to capital, Max J. Kuney, two hundred thousand dollars, debit to Max J. Kuney, Jr., two hundred thousand dollars, and credit to the account of 2801, capital stock, dated June 1, 1953, mean to you, Mr. Bowen, as an accountant?

A. It means that Account 2861 capital for Max J. Kuney, Jr., was charged with two hundred thou-

(Testimony of Harold V. Bowen.)

sand dollars and the account 2801 was credited, which would be the corporation capital stock account, two hundred thousand dollars.

Q. And if you assumed with me for the moment, Mr. Bowen, that \$400,000 represents all of the capital stock of the corporation at that time, as an accountant from this journal entry, who were the owners of such capital stock?

A. Max Kuney and Max Kuney, Jr.

Q. How about the children, the trusts?

A. This doesn't indicate the children as owning any.

Q. And the date, again, is what?

A. This is dated June 1, 1953.

Q. All right. Now, let's look at the next date, December 31, 1956. Now we see a debit to Mr. Wiginton for \$80,000; to Mr. Petersen for \$20,000, and corresponding credits in the capital stock account.

A. Yes, that is correct. [177]

Q. Now, as an accountant, from this journal entry when was the first time that Mr. Wiginton or Petersen became shareholders in this corporation?

A. December 31, 1956.

Q. All right. While I am finding the next page that I wish to inquire about, Mr. Bowen, it is true that the first year—at the end of 1952, I am speaking now of 1952, that the profits distributed were determined on the basis of the net total investment account, the first year, that is true, isn't it?

A. Yes.

Q. And could you turn with me to journal

(Testimony of Harold V. Bowen.)

voucher No. 1 of the Bible, we do see corporation minutes of February 7, 1957—are you with me, Mr. Bowen? A. Yes.

Q. And what do we mean by “journal voucher”?

A. This is a recording entry prepared in journal form to record information in the books.

Q. And these instructions at the top of this, which is before you, I take it, sir, is a management directive to the accountant as to what to do?

A. That is correct.

Q. Now, included in that management directive of what to do you see the language appearing after the parentheses and the numeral three, “Kuney partnership,” do you see [178] that? A. Yes.

Q. And what does it say about the Kuney partnership?

A. You have the original before you. I only have these eight photostatic copies.

(Whereupon, a document was handed to the witness.)

A. (Continuing): “Kuney partnership shall not charge the corporation rental for the use of its fixed assets fiscal year ended 1955 and 1956, but corporation shall pay interest on the partners’ investment in fixed assets at the interest rate corporation pays to banks for borrowed money during those years.”

Q. That was a management directive to the accountant, which was carried out, as far as you know? A. Yes.

(Testimony of Harold V. Bowen.)

Q. Now, the income to be distributed to the parents and the income to be distributed to the children will vary depending upon whether we take a percentage of this or whether we take a percentage of that (indicating)? A. Yes.

Q. And in some years we charge investments at interest rates here (indicating)? A. Yes.

Q. We will have that entirely different income than if we [179] computed as you did here for '55?

A. Yes.

Q. Now, here in 1955 you said rent was charged by this computation, didn't you? Didn't you so testify? A. Yes.

Q. And we are clear on the year 1955?

A. Yes.

Q. But the first management directive to the accountant was what again, "Kuney partnership shall not charge the corporation rental for the use of its fixed assets fiscal year—" what?

A. 1955 and 1956.

Q. But do what?

A. "—but the corporation shall pay interest on the partners' investment in fixed assets—".

Q. That isn't what you did here? That is clear, you didn't do that here, yes or no?

A. Well, on the original returns it was done.

Q. Do you understand the question? You didn't do that here?

The Court: He is asking you if you did that on the blackboard recitation which you prepared here this morning. That is what he is asking.

(Testimony of Harold V. Bowen.)

A. No.

Q. (By Mr. Biggins): Incidentally, in 1959, with which you are very familiar, they didn't charge any rent at all [180] in '59 either, did they?

A. No.

Q. Now look at journal voucher No. 3, which, I believe, sir, is over just one page——

A. Yes, I have it.

Q. Now, I am glancing down where it says, "To record following capital accounts, Kuney partnership." Do you see that? A. Yes.

Q. And we see "MJK" above it and "MJK" below it, which means what?

A. Max J. Kuney.

Q. Now, a generalized and professional question, Mr. Bowen, in applying generally accepted accounting principles to the books and records of a partnership, is it good and sound accounting principle to set up a capital surplus account in a partnership?

A. It is an unorthodox method. However, in this case I see nothing wrong with it.

Q. Do you find such an account ever suggested in the book you referred to by Finney?

A. No.

Q. Do you find such an accounting suggested in Mr. Paton's Handbook? A. No. [181]

Q. Do you find such an accounting principle suggested in the two volumes of the American Institute of Accounting? A. No.

Q. Do you find such accounting suggested in Wixon's New Edition? A. No.

(Testimony of Harold V. Bowen.)

Q. Do you find such an accounting suggested in Montgomery? A. No.

Q. Have we suggested the books we talked about a few moments ago? A. Yes.

Q. All right. But capital surplus accounts were established in this partnership by the directive of MJK, weren't they? A. Yes.

Q. And that was this personal account—this personal surplus account you were talking about on the blackboard of \$740,000? A. Yes.

Q. Which was under their control, we have established that? A. Yes.

Q. And under their control, they could determine the amount of income distributed to them, we established that? A. Yes. [182]

Q. Now, it is equally true, unless you want to go all the way through this, Mr. Bowen, it is equally true that sometimes in some of these years they computed the interest on this (indicating)——

The Court: On what?

Q. (Continuing): ——total investment, and in other years they computed it on breakdown, including your so-called fixed assets? They went back and forth, that is true, isn't it? Must I go through these, or don't you know?

A. Generally speaking, I think that is correct.

Q. We save much time by that, Mr. Bowen.

Turning to journal voucher 4, please, sir, are you with me there, the partnership agreement, "The partners of Kuney family partnership agree——"?

A. Yes.

(Testimony of Harold V. Bowen.)

Q. "The partners of Kuney Family partnership agree that effective January 1, 1955, and until this agreement is changed in—" what?

A. "Writing."

Q. All right. Now, did you ever secure anything in writing after this that you know of?

A. No.

Q. All right. Then they will agree that until it is changed in writing, which you haven't received, "(1) Active partners Max J. Kuney and Max Kuney, Jr., shall receive [183] total compensation \$10,000 per year from partnership income to be divided equally between them and that the remaining income shall be distributed in proportion to each partner's—" what?

A. "Capital investment."

Q. In what? A. Partnership.

Q. And the remaining income shall be distributed in proportion to each partner's capital investment in the partnership, and we did agree, when we started out, this is the investment in the partnership? A. Yes.

Q. All right. But that isn't what you did here in distributing income as directed by Max J. Kuney, that is correct, too, isn't it? That is correct, isn't it?

A. Yes.

Q. Now, No. 2. "Active partner's compensation each year shall be taken entirely from partnership capital gains—" do you see that? A. Yes.

Q. "——if such are sufficient——"?

A. Yes.

(Testimony of Harold V. Bowen.)

Q. And pursuant to that, in looking on down, still with the initials what?

A. "M.J.K." [184]

Q. We see the account "Capital Gains" and "Capital Gains" what—"Capital Gains" what—"Compensation," "Capital Gains Compensation." Do you see that?

A. Yes, down below.

Q. Now, I ask you, sir, have you ever seen such an account as "Capital Gains Compensation" in Montgomery, Paton, Wixon, Kohler, Montgomery, or American Institute?

A. No.

Q. Have you ever seen or instituted the account "Capital Gains Compensation" in the books of account of any other plant which you have as a client?

A. No.

Q. Turning, if we may, sir, to this letter of December 20, 1954—do you see it there, signed by Max J. Kuney?

A. Yes.

Q. My copy of this, if I may read it accurately, Mr. Bowen, dated December 20, 1954, from Max J. Kuney, Seattle, to Max J. Kuney, Spokane.

"To Max: As agreed by telephone today, I am giving \$3,000 to John's——"

Then "trust" is marked out?

A. Yes, it is.

Q. "——and \$3,000 to each of your two children's—" and "trust" is marked out?

A. Yes. [185]

Q. "——and you and your wife together are giving \$6,000 to John—" and "trust" is marked out—"and \$6,000 to each of your children in 1955 and

(Testimony of Harold V. Bowen.)

each year thereafter until one or the other of us cancels this agreement.”

“Therefore, on January 1, 1955, please cause the gifts of \$9,000 to be credited to—” and “the trust for” marked out—“John and the gifts of \$9,000 each to be credited to the trusts—” We apparently missed that one. Do you see that—“the trusts”—“Max J. III—” and again “the trust for” is marked out—“Caroline, with charge of \$9,000 to be made to my capital account and charge of \$18,000 to be made to your capital account January 1, 1955, and each year thereafter until one or the other of us cancels this agreement.”

It is signed by Max J. Kuney, whose signature you recognize? A. Yes.

Q. Immediately below that it says, “We do not agree as to gifts for 1955 but we have agreed as to gifts for 1956.” Do you see that? A. Yes.

Q. Signed by Junior and Senior? A. Yes.

Q. And we have the journal entry doing that on the next [186] page, as we turn over on voucher five. Do you see that, “Debit to capital and credit to the children’s capital account”?

A. I don’t have it on the next page, but I am sure it is in here.

Q. If I may approach the witness——

The Court: Surely.

A. I know those entries are made.

Q. Now, another way in which the amount of income would be determined under this theory, another way would be for the trustee to make a gift

(Testimony of Harold V. Bowen.)

out of this account into this account (indicating)?
That would change the precentage, wouldn't it?

A. Yes.

Q. And a different percentage would result if you made a gift out of this account (indicating) into this account (indicating)? A. Yes.

Q. And the \$3,000 here (indicating) is geared to the maximum gift that can be made tax free each year, isn't it? A. Yes.

Q. And as you read this——

A. (Interposing): Apparently this is correct.

Q. But the gifts were not going to be made by Senior unless [187] Junior over here (indicating) agreed that he would make similar gifts under this letter, that is clear too, isn't it?

A. Yes, that is the way it appears.

The Court: What did you say? I did not hear your answer.

The Witness: Yes, that would appear to be clear.

Q. (By Mr. Biggins): One final question.

We will skip most of the details, 1955, we didn't apply this method of profit determination in 1959, either, did we? A. No.

Q. And you did not receive, as indicated here, you did not receive a subsequent written directive changing the prior way of doing it? A. No.

Mr. Biggins: That is all.

The Court: Is there anything further from this gentleman?

Mr. Toole: Yes, your Honor.

(Testimony of Harold V. Bowen.)

Redirect Examination

By Mr. Toole:

Q. The first thing I would like to clear up, Mr. Bowen, on [188] the blackboard, in Mr. Biggins' examination he indicated for the year 1955 there were three different profit-sharing ratios used, and he indicated these (indicating), the original return, the Bible, and the amended return? A. Yes.

Q. Is that correct? A. Yes.

Q. What is the reason for the variation between the Bible and the amended return?

A. That variation was due to the California property having been left out of the computation made in the Bible.

Q. An arithmetical error?

A. I think it was an inadvertence.

Q. Was the California property on the books of the corporation? A. Yes.

Q. Was it subsequently?

A. It was on the books of the partnership.

Q. On the books of the partnership, was it subsequently found?

A. No, it wasn't found, it was there all the time. It was just simply omitted in the original entry made in the Bible.

Q. So isn't it true that on your audit you simply corrected an error, and that is the only reason for that change? [189] A. That is correct.

Q. Now, on journal voucher one in the so-called

(Testimony of Harold V. Bowen.)

Bible, on Page 2 of journal voucher one, the last sentence of the first paragraph, commencing with subparagraph 3—have you found that?

A. Yes.

Q. Page 2 of journal voucher one, directing your attention to the subparagraph 3, which Mr. Biggins read to the effect that the Kuney partnership shall not charge the corporation rental for the use of its fixed assets during 1955 and 1956, are you aware of the circumstances prevailing on January 7, 1957, which presented that directive to you as an accountant?

Mr. Biggins: I must object here, your Honor, it has been established that he was the author of this Bible. The question was geared from his understanding from the Bible. This question goes back to the conclusions of the man that prepared the Bible.

The Court: Read the question.

(Whereupon, the last question was read by the reporter.)

Mr. Biggins: If I may, your Honor, as you see, what facts and circumstances led to that directive would require the testimony of Mr. Kuney, [190] himself, and by anybody else it would be a conclusion.

The Court: Do you have first-hand knowledge of this, or is this something somebody told you about? First, do you have any knowledge about facts and circumstances?

The Witness: Yes.

(Testimony of Harold V. Bowen.)

The Court: Who did you get it from?

The Witness: From my own working with the company.

The Court: All right. You may answer.

Q. (By Mr. Toole): Why was the decision made not to charge rent for 1955 and 1956?

A. The principal reason was because they were unable to determine how much—what rent they could charge and would be accepted by the Internal Revenue Service.

Q. Was agreement finally reached between the Internal Revenue Service and——

A. (Interposing): For the years 1952, '53, and '54 it was.

Q. When was that agreement reached?

A. Well, I couldn't remember that, it was sometime—I believe it was probably some time in '57, but I couldn't be sure of that date.

Q. Are you aware of the fact on the books of the company the rent was actually recorded for '55 and '56—for the years 1955 and 1956 at a later time?

A. Yes. [191]

Q. Following the settlement of the years '52, '53, and '54? A. It was some time after that.

Q. And isn't it true, then that the amended income tax returns for the partnership do record rental income? A. Yes.

Q. And that the division of the profits—of rental profits based upon the proportion of the investment of the fixed assets includes rental income actually credited to the partnership?

(Testimony of Harold V. Bowen.)

A. Yes, that is correct.

Q. For the years '55, and '56? A. Yes.

Q. Has the rent for the years 1955 and 1956 yet been settled with the Internal Revenue Service?

A. No, I believe not.

Q. Has any audit been received for those years yet? A. Not that I know of.

Q. Are they still being examined by the Revenue Agents?

A. I think they are in the process of audit at the present time.

Q. For the year 1955 you still have no report?

A. No.

Q. Who is making that audit?

A. I believe Revenue Agent Carney.

Q. Sitting at the other table? [192]

A. Yes.

Q. With respect to the surplus capital and the concept that part of the partnership investment is invested in fixed assets and part in surplus capital, you testified, I believe, under cross-examination that this was not an orthodox concept? A. Yes.

Q. Is there anything illegal about such a concept, to your knowledge?

A. Not that I know of.

Q. Does this concept go to anything more than the manner in which profits are divided?

A. That is all. It is used primarily for—as a basis for determining the profits, division of profits among the partners.

Q. As an independent certified public accountant

(Testimony of Harold V. Bowen.)

are you in a position to dictate how profits should be divided? A. No.

Q. Do you or do you not accept their direction—the directions of the partners?

A. Generally speaking, yes.

Q. And who are the partners from whom you receive the instructions?

A. Max J. Kuney, Sr., and Max J. Kuney, Jr.

Q. As individuals? [193]

A. As individuals and as trustees.

Q. Directing your attention to journal voucher four—do you have that? A. Yes.

Q. I believe Mr. Biggins read the first part of that paragraph, which said “—that the remaining income shall be distributed in proportion to each partner’s capital investment in the partnership.”

Do you see what I am reading? A. Yes.

Q. Now, directing your attention to the journal entry immediately below that statement——

A. Yes.

Q. Is the journal entry recorded by Max J. Kuney, does it divide the profits on the basis of the total investment in the partnership, in this case the \$1,325,000 figure, or has this divided the profits on the basis of investment in fixed assets?

A. It divides the profits on the basis of investment in fixed assets only.

Q. So notwithstanding the general statement preceding the journal entry that profits were to be divided on the basis of a total investment, doesn’t

(Testimony of Harold V. Bowen.)

that journal entry actually indicate that profits were divided on the basis of the fixed assets? [194]

A. Yes, it does.

Mr. Toole: No further questions.

Recross-Examination

By Mr. Biggins:

Q. May we clarify the last point before we get to the prior ones.

Look carefully at that journal entry again, please, sir.

A. Which one?

Q. The one you were just talking about on journal voucher four. Look at it most carefully with me for a moment.

It is clear, as you testified, that the entry made in the books does not conform with the managerial directive made, and Mr. Toole established that, didn't he, that that journal entry does not conform to the management directive?

A. The management directive says, "Total investment to each partner's capital investment."

Q. Please, can't you answer that?

The Court: Answer the question, please.

Q. (By Mr. Biggins): The journal entry doesn't conform? A. No.

Q. Let us examine the journal entry. This was the distribution of the earnings, isn't it, this journal entry? [195] A. Yes.

Q. The parents made some money, and the kids made some money, didn't they, from this journal

(Testimony of Harold V. Bowen.)

entry? A. That is right.

Q. Now we are most mindful of the distinction between this account, the fixed asset account and the surplus account, aren't we? A. Yes.

Q. And in this journal entry we have the debit to Max J. Kuney capital and capital gains, do you see that debit and credit there and ledger entry for about \$6,000? A. Yes.

Q. Now look with me at the account No. 2861—do you see that? A. Yes.

Q. Now, does 2861 mean the personal account or the fixed asset account?

A. I don't know, I don't have the chart of accounts.

Q. It is the personal account, isn't it?

The Court: These account numbers are a system designating various accounts on the books and records of the concern, is that right?

The Witness: Yes.

The Court: Ladies and gentlemen of the jury, when you refer to "2861," that is an arbitrary [196] number given to a particular account, for those of you who may not be familiar with bookkeeping and accounting procedures.

Q. (By Mr. Biggins): My pending question was, Account No. 2861, Max Kuney, is that the plant investment account, as you call it, or the personal account? A. It is a personal account.

Q. And the same question for Max, Jr., did that go to a personal account or to the plant asset account. A. To the personal account.

(Testimony of Harold V. Bowen.)

Q. Now, let us see what we did with the children. The trust for John R. Kuney, Jr., Account 2833, is that a plant asset account or the personal account?

A. That is the plant asset account.

Q. And it is the plant asset account that determines how much profits are to be distributed?

A. Yes.

Q. Mr. Bowen, as far as you know, who determined whether Max Kuney would have this money go into his plant account or into his personal account? Who determined that?

A. (No response.)

Q. Please, he didn't? It is easy, he didn't, did he?

A. Yes.

The Court: Is there any doubt in your [197] mind?

The Witness: Yes, I can't say that he did it. I have no knowledge—no personal knowledge that he personally did it.

Q. (By Mr. Biggins): A moment ago you were talking about your personal knowledge. Which is it? Do you have or don't you have?

A. I couldn't remember—all I am going on is what it says in this directive.

Q. All right.

A. Not what he told me. He didn't tell me anything.

Q. He what, sir?

A. Well, he didn't tell me anything about this. He has got his initials on it, yes, that is true.

Q. I will accept that, Mr. Bowen. But this much

(Testimony of Harold V. Bowen.)

is clear, the amount of income being distributed to the children depends upon the fixed assets computations which you talked about when you first testified this morning? A. Yes.

Q. Now, one more thing that could change the amount of income they got, we now find, is whether Max Kuney, Sr., directs that the earnings go to his fixed asset account or to his personal account? That is also true, isn't it? A. Yes.

Q. Depending on what he tells the accountant to do, it will determine this too, isn't that [198] true? A. Yes.

Q. And it is also true that some years he would do it one way and some years he would do it the other way, or must we look for that, too?

A. No, I don't think that is true. I think that it has been consistent following the finalization in 1957. For the year 1955, as it now stands in the books, it has been consistent from 1955 to the present time.

Q. Your language, I believe, sir, was unless it was finally what?

The Court: "Finalized" was the word you used?

The Witness: It was until it was finalized.

Q. (By Mr. Biggins): What do you mean by it in that paragraph, it was finalized?

A. The concept that rental income will be paid on the basis of investment in fixed assets only.

Q. And that was not finalized until 1950 what? Was that 1957?

A. I am sure that is right, until 1957.

(Testimony of Harold V. Bowen.)

Q. When you say it wasn't finalized, let us identify the personality, finalized by Mr. Kuney, Sr., or Mr. Kuney, Jr.? A. That is right.

Q. And the years we are talking about for income tax purposes are what? [199]

A. 1952, '53, and '54.

Q. Before even the method of income distribution was finalized, is that correct?

A. In those three years it was——

The Court: Can't you answer that question? It is obvious that if it wasn't finalized in 1957, it wasn't finalized during the period '52 and '53?

The Witness: No.

The Court: Why do you have any difficulty in answering that kind of a question?

The Witness: Because there actually was a change in determining the income as of 1955.

Q. (By Mr. Biggins): My preceding question before that battery, I believe, Mr. Bowen, is that they handled it one way at one time and one way at another, to which question you can say yes?

A. Yes.

Q. You can now say yes? A. Yes.

Mr. Biggins: That is all.

The Court: I believe that is all, Mr. Bowen. Thank you. You may leave whenever you wish.

(Witness excused.) [200]

MAX J. KUNEY, JR.

the plaintiff herein, called as a witness on his own behalf, being first duly sworn, was examined, and testified as follows:

The Clerk: State your name, please.

The Witness: Max J. Kuney, Jr.

Direct Examination

By Mr. Toole:

Q. How old are you? A. I am 42.

Q. What is your educational background?

A. I went to high school in Spokane, two years to the University of Washington.

Q. What subjects?

A. One year in the business school and one in engineering.

Q. Where are you working now?

A. Out of Spokane, I operate the Spokane office.

Q. What is the general nature of your duties in connection with the Spokane office at the present time?

A. I am in charge of that operation—in general charge of the office itself, do the bidding and estimating with hired estimators under me; in charge of the job organizations, staffing them and acquiring superintendents and foremen, and in general, equipment allocation as [201] needed on the job. All the things that it takes to run a construction business.

Q. Do you do this work under the supervision of your father?

(Testimony of Max J. Kuney, Jr.)

A. Not directly. Of course, we consult on matters of policy, but he doesn't live in Spokane and is not there to supervise that type of thing. That is a day-to-day full-time job.

Q. Is it accurate to say that you are running the contracting end of the business in Spokane?

A. Yes, that is accurate.

Q. Directing your attention to the time these family trusts were set up, at that time, I believe, the testimony was shown that your equity in the partnership was approximately \$500,000?

A. Yes.

Q. In the latter part of 1951, is that correct?

A. Yes, that is correct.

Q. When did you first consider the setting up of trusts for the benefit of your children?

A. It was several years after the close of World War II that I first started to think about trying to do something for my children and to realize that that was one way that something could be done. But it wasn't until Congress enacted legislation which appeared to me made [202] it proper and would not probably involve litigation, that I seriously considered taking that step.

Q. That seems to have been an error in judgment, doesn't it? A. I make a lot of them.

Q. Is it fair to say that the thought of establishing a trust occurred to you prior to the time it occurred to your father? A. I don't know.

Q. With whom did you consult professionally with respect of the establishment of a trust?

(Testimony of Max J. Kuney, Jr.)

A. With Bill Witherspoon of your firm.

Q. About when was that?

A. The first time I talked to him might have been about 1948 or '49, and he didn't think very much of the idea at that time. He thought you would have to go through court to establish a valid trust or establish the validity of it.

Q. Did you consult with Mr. Witherspoon following the enactment of the so-called Family Partnership Act? A. Yes.

Q. When was that? When did you consult with Mr. Witherspoon, approximately?

A. Some time along in 1951, I think after they had passed that Act and had some information on it. [203]

Q. Did you discuss with Mr. Witherspoon in his office the provisions that you wanted to have in such a trust?

A. Yes, in general so far as they concerned the powers and the duties of the trustee to protect the income and protect the children and their interests. I didn't discuss fine legal points with him.

Q. Did you have any discussions about what provision should be made for distribution to your children? A. Yes.

Q. Would you outline in general what your discussions were and your final conclusions?

A. Well, there were discussions on many alternate provisions as to when the principal would have to be paid or when income should be paid, and the things that a skilled attorney in trust matters would

(Testimony of Max J. Kuney, Jr.)

bring to our attention, and also, why, he pointed out that if there weren't some—if there wasn't a little discretion left in the hands of the trustee, these trusts could become a thing of danger to the children, possibly.

Q. How do you mean?

A. Oh, for example, with the trust for a little girl like my daughter, Caroline, who was two then, if she was absolutely—if there was an absolute requirement for the trustee, for example, say to distribute principal to her at age twenty-one, or something, she might [204] acquire a fortune-hunting husband. So that the trust would become a detriment in her life rather than an asset.

We discussed the various reasons why or the various things that could happen, and he suggested and I suggested rules that could be written into the trust to safeguard that to bring a third party in.

Q. Is it accurate to say that as a result of these discussions that it was your opinion that the provisions in this trust would be suitable for your family?

A. Yes, I thought they were.

Q. I am speaking of the provisions regarding the distribution of income.

A. Yes, I thought for the trustee to have the discretion to appraise the child, his developments, his interests, his occupational status, and his need, was desirable rather than something completely unrestricted with a person too young—anything could happen to a two-year-old. Maybe she has a mental condition by that time, who knows?

(Testimony of Max J. Kuney, Jr.)

Q. You were present in court yesterday and heard the testimony of your father with respect to the administrative provisions of the trust, the exoneration from accounting under the Washington Trust Act, and exoneration from judicial review? You discussed those matters with [205] Mr. Witherspoon?

A. Not in great detail. I believe I did notice some of them, and in some cases I asked him for an interpretation of what they meant and why they were there, and he gave me a reason at the time that he believed that possibly some things were rather standard to put in trusts of that type, and other things had some significance I hadn't grasped. He explained the points on which I raised a question, and I was satisfied.

Q. Did you direct him to put all of those administrative powers in there item by item? A. No.

Q. Did he submit them to you for your approval?

A. Yes, he submitted a draft of the trust, which he thought took care of the items we discussed that were desirable for the good of my children.

Q. Were you satisfied that the trusts finally prepared by Mr. Witherspoon would accomplish the object you had in mind?

A. I thought so at the time, yes.

Q. In the trusts created for Caroline and Jeff you named your father as trustee. What prompted you to consider him as a trustee of those trusts?

A. He is the grandfather of my children, and he

(Testimony of Max J. Kuney, Jr.)

knows them better than anybody else, aside from me, and I think as [206] long as he lives, he would be the best fitted person, aside from myself, to act for their benefit in a personal way and in a business way. He is the only person I know of outside of myself who could be induced to serve as a trustee who could still fully handle their financial interests in our business, because that is what I was doing, I was creating a partnership with myself for my children.

Q. Couldn't you have given something other than a partnership interest to the trustee so that it wouldn't be necessary for him to be an experienced partner in the contracting business?

A. What I wanted to do was give an interest in the business for personal reasons. We thought my son would come in with me. I wanted to do this in any event, but secondly, I didn't have anything to give him outside of the business.

Q. Did you have any outside investments, stocks and bonds of your own?

A. I have never invested in those things. I do have kind of a personal matter. I have got an investment in the Spokane Ski Club. I have got a thousand-dollar note or a bond of theirs. I think that is about the only outside investment.

Q. Everything else you have is in the partnership? [207]

A. That is right.

Q. When you considered appointing your father as trustee, did you or did you not expect him to use his judgment in the administration of that trust?

(Testimony of Max J. Kuney, Jr.)

A. I certainly did, as I have just explained. I appointed him trustee because I valued his judgment and wanted it.

Q. In reading the trust instruments you were aware that he had broad powers? A. Yes.

Q. Did you retain any powers to control or direct him in the trust instruments?

A. None whatsoever.

Q. Did you or did you not retain any power to control him in fact?

A. No, I don't control my father in fact.

Q. There were no side agreements?

A. No side agreements.

Q. Have you been satisfied with the manner in which he has administered the trust for your children? A. I have been so far, yes.

Q. Approximately what is the value of those trusts now?

A. I believe—may I refresh myself—I think it is \$215,000 in the trusts exclusive of their personal account.

Q. Have you got the figures there? [208]

A. Yes, it is about that.

Mr. Biggins: We will stipulate to the amount just given.

A. You are talking about the trust for my children?

Q. (By Mr. Toole): That is correct, the trusts for your children.

Mr. Biggins: I will stipulate as to the amounts. I think it is about \$215,000.

(Testimony of Max J. Kuney, Jr.)

A. It is about \$215,000 in John's trust, which I manage, and I am more familiar with that, and I think my children's is about the same.

Q. (By Mr. Toole): About \$215,000?

A. Yes.

Q. Are you satisfied with the fact that your father has left all of the assets of the trusts invested in the partnership?

A. Yes, I am satisfied with that investment. It has been paying. It runs about, I think, around 18 per cent compound interest after taxes so far, and I don't know where he could have done any better or anything approaching that for the same degree of safety and certainty as has been the record so far.

Q. Is it your understanding or is it not that your father could withdraw part of this investment from the family partnership and invest it [209] elsewhere?

A. Of course he can.

Q. When I say "you," I think of you and your wife, Constance, as technically and legally as the donors, so I will just say "you."

Do you file federal gift tax returns?

A. Yes.

Q. And pay the gift taxes? A. Yes.

Q. As stipulated, you filed Washington State gift tax returns and paid the gift tax?

A. Yes, I did.

Q. And the government hasn't offered to refund the gift taxes? A. No.

Mr. Biggins: What was that?

(Testimony of Max J. Kuney, Jr.)

The Witness: I said no. He asked if the government offered to refund the gift taxes, and I said no.

Mr. Toole: Strike the question.

Mr. Biggins: I don't want it stricken.

Q. (By Mr. Toole): Did you participate in the decision to form the corporation in the middle of 1953? A. Yes.

Q. What factors prompted you to consider the advisability of organizing this corporation in the middle of 1953? [210]

A. Two factors, as far as I was concerned. For a long time we had a bonus arrangement or special partnership arrangement running with our general superintendent and our office manager, who had been this fellow Wiginton and Petersen, and I thought it would be desirable if there was some way in which they could have a reasonably substantial equity in the construction operations, and the corporation would accomplish that.

Q. In what way?

A. Where they could buy stock. However, if it wasn't an over-all corporation, the value would be too great for them to have a good equity. That was one consideration in retaining the fixed assets only in the family partnership, to reduce the size of the corporation.

Secondly, I liked the ease and convenience from a family partnership and trust standpoint of operating a business which only dealt with renting equipment, which was not concerned with the complexities of active construction work. And I thought

(Testimony of Max J. Kuney, Jr.)

about it, as, I believe, somebody read out of the Bible, that in case I die, it was a rather automatic business for my wife to be taken care of from the income which she would have from my portion of that partnership business. It would be a much more certain and simple thing for her to be involved in and not requiring her or her attorneys to look into [211] active operation. It would be a rather automatic business. Those were two considerations of mine.

Q. At that time you were also trustee of the trust for your half brother, John?

A. That is correct.

Q. And did you consider it as a wise thing to have the corporation formed and the operating assets taken out of the partnership from the point of view of the trustee also, or did you not?

A. Yes, I thought it was all right. In fact, I thought it was a good idea. Our business record is such that I can't recognize much risk in it, but if there is any risk, it certainly is in the operation, and from that standpoint it was even safer, and I looked at it as being absolutely fair, as we have done with other partners when we changed our business—to have a bigger interest in a smaller business, probably with the same over-all profit expectation, maybe a little better—I should say for the trusts to have a bigger interest. Maybe it was a little better protection all the way around, a little simpler business for a successor trustee when the time came for

(Testimony of Max J. Kuney, Jr.)

a corporate trustee to run that where he couldn't do much with that construction business.

Q. Passing from the considerations for the organization of [212] a corporation and turning for just a moment again to the creation of the trusts, was there or was there not any business reason for the creation of the trusts for Caroline and Jeff, in your opinion?

A. No, there wasn't any business reason whatsoever.

Q. What do you mean, there was no business reason?

A. Well, I wanted to take my children into the partnership, as I understood I was entitled to do by law. It didn't change the business.

Q. The general contracting business?

A. No, it did not, in taking those trusts into the partnership.

Q. It simply changed the persons who owned an interest in it?

A. It changed the ownership of interest. It didn't change the management at that time, and I certainly am unaware today if there is any requirement for a business purpose under this law.

Q. Now, directing your attention to the trust created by your father, of which you are a trustee, what is your concept of your duties as a trustee of that trust for the benefit of John?

A. I am in charge of it. I have got to run it, and from a business point, I have to watch that investment and see that I handle it to make as much as

(Testimony of Max J. Kuney, Jr.)

can be made for the [213] trust for his ultimate benefit and for him, and that I handle it with safety and with reasonable prudence as any man would do in any business he got into, and also I have to consider his needs, and possibly later on his desires, and when he is a little more mature, as to the distributions of income until he is thirty, and after that there is no question about a distribution of principal from the age twenty-one on.

Q. Where is Johnnie right now?

A. He is a first-year high school student at Cate's School down at Santa Barbara—Carpenteria.

Q. How old is he?

A. He is fifteen years old yesterday.

Q. And to complete the picture, where are Jeff and Caroline right now?

A. Jeff is a freshman at Washington State U, and Caroline is probably getting out for lunch from the fifth grade at Sacred Heart School in Spokane.

Mr. Toole: Your Honor, it is exactly twelve. My examination will take a little bit longer, and it would be convenient now to interrupt.

The Court: All right. We will recess until 1:30, ladies and gentlemen. I hope you have a nice lunch and keep in mind my admonition about not discussing the case.

(Whereupon, a noon recess was taken.) [214]

Afternoon Session

(Whereupon, on Tuesday, November 22, 1960, at the hour of 1:30 o'clock, p.m., all counsel heretofore noted and the jury being present, the following proceedings were had to wit:)

The Court: Go ahead, please.

MAX J. KUNEY, JR.

having previously been sworn, resumed the stand and testified further, as follows:

Direct Examination

(Continued)

By Mr. Toole:

Q. Mr. Kuney, at the time your daughter was going out to lunch we were discussing the concept of your duties as trustee for the trust and benefit of John.

To date where have the funds under your administration as trustee been invested?

A. They have been invested in the fixed assets in the partnership or loaned to the business on an interest-bearing basis.

Q. Do you consider yourself free to invest the funds in other investments when the occasion arises?

A. Certainly.

Q. Would the Bailiff hand to the witness Exhibit 29, please?

(Whereupon, a document was handed to the witness [215] by the Bailiff.)

(Testimony of Max J. Kuney, Jr.)

Q. Exhibit 29, being a letter to the Inheritance Tax Division of the State of Washington, dated August 7, 1953, signed by you, is that correct?

A. That is right.

Q. What matters were under correspondence between you and the Inheritance Tax Division at that time?

A. The amount of gift taxes to be paid to the State of Washington on the transfer of the partnership interests in trust.

Q. Is it correct that the valuation—value of the property given was under discussion?

A. Yes.

Q. Would you read the last paragraph on the first page of this letter, please?

A. "The gift made was exactly \$100,000, which at the date of gift was accomplished by transferring that amount of capital from the donor's capital account to the trustee's capital account, with revision of partnership interest in conformity. The trustee has the complete right to remove this \$100,000 from the firm and invest it outside the firm, and it is quite possible that he may follow such a course at a future date. Under the circumstances, we fail to see how the gift can be construed to be other than the \$100,000, which it was." [216]

Q. Thank you. During the course of the administration of this trust for Johnnie did you distribute any part of the trust income to Johnnie or for his benefit?

A. Yes. In 1952, the first year of the trust.

(Testimony of Max J. Kuney, Jr.)

Q. How was that distribution made?

A. It was accomplished by a ledger entry. He received \$18,000 some dollars, and, as I remember, the taxes were around seven.

Q. What was the net effect of this ledger entry that you speak of?

A. The effect was that he wound up with about \$11,000 after taxes in a personal account for him, which naturally came under the guardianship of his father, not me. It was personal capital at that stage, which was available for his needs or desires as his father would see fit.

Q. Do you understand what it means to be subservient to the will of another? A. I think so.

Q. Will you tell the jury what you understand by that term?

A. I think "subservient" means to, in effect, follow the will of another regardless of your own will or thoughts or desires, to be governed by those.

Q. As a trustee were you or were you not subservient to the will of your father in the administration of this trust [217] for Johnnie?

A. No, I have never been subservient to his will in the trust or otherwise during the years.

Q. Let me ask you this, in the conduct of the affairs of the Kuney family partnership how are you able to distinguish your obligations as a trustee holding part of the interest in the partnership and your obligation individually? How are your interests individually?

A. Well, I have never had any difficulty in rec-

(Testimony of Max J. Kuney, Jr.)

ognizing what my different obligations in a different position are any more than I was as a partner in Kuney-Johnson Company in recognizing my obligations there. I never tried to cause Kuney-Johnson expense for the gain of Max Kuney Company because I had a larger interest in Max J. Kuney Company than I did in Kuney-Johnson Company. It is no difficult problem to conform to several sets of obligations. I am accustomed to that.

Q. You are accustomed to wearing several hats?

A. Always for many years. I always had four or five partners in several different businesses at the same time.

Q. Has there been substantial disagreement between your father and yourself relative to important business matters?

A. Occasionally. [218]

Q. Could you give us an example?

A. Well, the most recent and perhaps the most important was in 1958 when he desired to establish a separate contracting branch in Seattle to do highway work after the dissolution of the other Seattle businesses, and at first I agreed with that idea because we planned it to be completely separate and autonomous, to have its own shop and own equipment, and he took in two outside partners outside our business, outside our family, and formed the company. But then he decided he wanted to run it with equipment from Spokane, that is, family partnership equipment and use it for piecemeal periods and return it, and we would not have maintenance

(Testimony of Max J. Kuney, Jr.)

facilities here for it. So I did not approve, and there was quite a considerable argument, believe me, but the ultimate result was that that company was dissolved, the other investors received their money back, and we did not go into the business here.

Q. Mr. Kuney, at this point I would like to revert to the emphasis that has been placed upon the fact that during the years 1955 and 1956 no rental income was paid by the partnership—paid by the corporation to the partnership, or, at least, it was suspended. I wonder if you in your own words could tell us the background and how the partnership and corporation arrived at that [219] position where there was a suspension of the decision to pay rental income in its determination?

A. Well, in 1952 we had a general partnership, which was contracting entirely, owned equipment, and we took in the trusts as partners, and we determined to split operating profits on the basis of capital equities, and that rental income would be computed at fifty per cent of the prevailing rates in the construction industry based on the periods of actual use, and 1952 was handled that way.

In 1953 we operated an over-all partnership for part of the year and then incorporated the business. The operating profits for that part of the year were distributed on a basis of total capital of the various partners. The rental was again computed just like the fifty per cent of the AED rates, as they are called, the going rate in the industry.

In 1954 we no longer had operating profits to

(Testimony of Max J. Kuney, Jr.)

consider, but the rental was divided on a basis of capital equities and computed on AED rates.

In 1955 I believe the same thing was originally done.

Q. Excuse me for interrupting, was that reflected on the first income tax return filed for 1955?

A. I believe it was on the original tax return for '55. [220]

Q. Rental income was paid by the partnership—by the corporation to the partnership?

A. That is my recollection. Then along in there we came into a Revenue Agent's examination of our entire business, and there were many contentions originally advanced, and amongst them was that the corporation could not be considered at all, that it was not valid for some reason, and that if it was allowed, why, no rental—the corporation was allowed to continue, but no rental should be paid on any equipment. We could only receive interest on the investment, and, furthermore, that if the corporation was allowed and rental was allowed, why, the corporation in fact owned certain fixed assets in Seattle, and the partnership didn't own them any more. They had been transferred to the corporation regardless of our intentions or our books or our corporate minutes, and that if the corporation was allowed, there was disagreement on the distribution of income between the partnership and the corporation, and that if rental was finally allowed by some superior authority, why, it could not be computed on the basis it had been because it was subject to our

(Testimony of Max J. Kuney, Jr.)

control to set down the periods of actual use. In other words, we might be dishonest, so some method would have to be devised that was honest or there was no possibility of [221] dishonesty, and there was a protest to this total capital being—total capital being considered as a basis for the basis of distribution for rental because the charge was made that all my father and I had to do as the senior partners with more capital, if we wished to increase the trust interests, was to just take out some capital. If we wanted to decrease the trust interests, we could, and if we could find it some place else, we could go outside and bring in some capital. That was subject to our control.

So we actually didn't know where we stood, and we had meetings and discussed the fact that when this was finally settled we would certainly have to set up some kind of system which would eliminate these objections which might remain. So we arrived at the concept that if the capital in the family partnership was only in fixed assets, that is the way the profits were divided, why, they couldn't charge us with juggling this money because we would have to sell the equipment that we needed in the business or buy equipment that we didn't need, and then the capital equities would still stay the same. It wouldn't change anything. That became fixed. Also, we determined we would have to have a method of computing rental that nobody could say we just made up in our own private way to get a total that [222] suited us.

(Testimony of Max J. Kuney, Jr.)

So we arrived at the fact that depreciation had to be approved by the Bureau of Internal Revenue, and the percentage of depreciation was something that was not subject to tampering with, and that would be a fair concept. But we didn't have any idea what percentage to apply because the Internal Revenue in going through all this went rather slowly, and until we had some idea of how much rental in total they would allow, we couldn't say what percentage of depreciation might be allowed, because it was still in the mill.

Well, some time about maybe in 1957 finally a lot of matters were settled, and the conferees in Spokane——

Q. Who are the conferees?

A. Well, they are kind of a first appeal board above the Revenue Agent Carney, possibly the appellate board in Seattle who were an appeal board above the conferees in Spokane, settled many matters. They settled that the corporation should be allowed. They settled that rental in addition to interest should be allowed. They settled that the partnership and corporate distributions of income were substantially correct. There were minor changes, and we have a figure to work with, and they also arrived—Mr. Carney's figures that he had arrived at, which changed our rental around one per [223] cent, but we now knew what was going to be allowed and was finally approved by the appellate staff in Seattle.

Q. On what date?

(Testimony of Max J. Kuney, Jr.)

A. It was in 1957 some time. I can't put it all together. Anyway, following that much information, we could then do many things to get our bookkeeping caught up, and that is what all this delay is about, and we finally knew the story. We could then issue stock to the partners. We at least knew we had a corporation. We could issue stock to the two partners that had been promised stock two years before. We knew we were going to keep on having it. We could correct an error we had in our own accounting wherein—in the concept that all the partnership capital was invested in fixed assets, it created a surplus.

My father and I were the only ones that had surplus, and we obviously had all the money in the stock. It was no matter for the trusts to be involved in, and everything we did along here was to really get our bookkeeping caught up as soon as we had enough information from the Bureau of Internal Revenue to be sure we wouldn't have to change it once more. I think really what happened here in '55 is that we originally set up this rental on the old AED system. Then we actually filed an amended return and just took all the rental out and [224] said, "At least, we haven't got it all in that particular year yet. We will give it a clean slate, and when we find out what we can have, we will make a new tax return for that year and go along."

But these matters weren't actually all settled for '52, '53, and '54, until very close to the end of 1957 or possibly early 1958, which accounts for the late

(Testimony of Max J. Kuney, Jr.)

dating of these entries to go back and pick up these years, that we didn't know what to do with this until we found out what happened to the years before. We had no basis.

I hope my explanation is clear. It is kind of complex, and that is all I know about it.

Q. And your story can be verified by the tax returns and the minutes? A. I believe so.

Q. You have refreshed your recollection by referring to those instruments?

A. In brief, yes.

Q. One point I want to develop, you testified, as I recall, that you decided that the profits should be divided between the trusts and the partners on the basis of their investment in the fixed assets?

A. That is correct.

Q. Why did that appeal to you as a superior method of [225] dividing profits rather than on the basis of their investing in the total investment in the partnership?

A. Well, number one, why, at least the fixed assets had a recognized value at the end of every year. You might say there was a value approved by the Bureau of Internal Revenue. They have to approve the depreciation schedule and all reductions and additions in value so that there was no tampering. The effect of it was to put the trusts all in the partnership and completely out of the corporation.

The effect of the total transaction, of course, was that they received a much larger interest in a

(Testimony of Max J. Kuney, Jr.)

smaller business with the thought that the profits would be probably fairly and evenly—that it would be a fair and equal transaction. It has worked out to be a little more than fair to them, but that is beside the point, too.

Q. If the profits are divided upon the basis of the investment and fixed assets, isn't it a simple thing to increase assets and decrease assets and manipulate all the control over the amount of assets?

A. It would be simple but foolhardy because to do so, we would have to either sell equipment we needed in the business to reduce assets or buy equipment we didn't need to increase assets. If we normally buy and sell, [226] it is in the normal course of our business. We sell what we don't need or what is obsolete, no longer useful to us, and we buy what we need to replace it.

Q. Have you ever made any decision to buy or sell fixed assets in the partnership for the purpose of changing partnership profit ratios?

A. Well, certainly not. That wouldn't be sensible. It would be very expensive to buy something you couldn't use.

Q. Have you ever considered the thought?

A. No, I have never considered the thought, and I believe I might be correct in saying as long as everybody has enough money to cover it, you wouldn't change the ratios anyway as long as everybody had enough money to cover the purchase coming out of their surplus accounts.

(Testimony of Max J. Kuney, Jr.)

Q. It has been pointed out in prior testimony that this division of profits on the basis of investment of fixed assets was recorded in the Bible in the year 1957 effective for the year 1955. Do you recall that testimony? A. Yes.

Q. That the profits were divided on the basis of a fixed investment and fixed assets for the year 1955? A. Yes.

Q. Do you recall the testimony that the date the Bible [227] bears in February 2, 1957?

A. I believe that is right.

Q. Was the decision to divide the profits on the basis of investment in fixed assets made prior to February 2, 1957, the date of the Bible in which these are first recorded?

A. Well, yes, certainly it would be made sometime prior to that. There was a decision made that a new method to meet the Bureau of Internal Revenue objections would have to be adopted way prior to that. Whenever we finally got the information which led us to believe that this system would be approved, it was agreed to implement it, and it may be that there was a time lag of a week or two in the writing up of the journal entry which you refer to.

Q. You don't mean to imply there was only a week or two before that that you decided to change the profit-sharing ratio?

A. No. A long time back we knew we had to change it. We didn't know quite how we would be able to do it. That is what I was attempting to develop in my earlier testimony. Until we had all the

(Testimony of Max J. Kuney, Jr.)

facts, as we kept getting Revenue Agent agreements, we were able to take another step which we thought would conform to the Bureau's—or would get the Bureau's approval. At least [228] it wouldn't be inconsistent and was something they previously allowed.

Q. At least it wouldn't be inconsistent with what?

A. At least it wouldn't be inconsistent with something which had previously been allowed back in those other years. That is what we are trying to find out about.

Mr. Toole: Hand Exhibits 24 and 25 to the witness, please.

(Whereupon, certain documents were handed to the witness by the Bailiff.)

Q. (By Mr. Toole): Are not these exhibits, Mr. Kuney, the agreements between you and your father as individuals and as trustees with respect to the division of profits made February 11, 1952?

A. Yes.

Q. Will you describe in your own words how the division of profits was made according to that agreement?

A. It was made on the basis of—after reduction of salaries for the active partners, it was made on the basis of the ratio of the capital account that they bore to each other, and that was the total capital account at that time.

(Testimony of Max J. Kuney, Jr.)

Q. What kind of business were you conducting at the time that agreement was entered into?

A. A general partnership. [229]

Q. There was no—just fixed assets in the partnership, it was a general contractor?

A. That is right.

Q. Do you agree that the agreement or that the manner of dividing profits in the year 1955 on is different than the manner of dividing profits between those two agreements?

A. The manner? No.

Q. The agreement with respect of—

A. (Interposing): The manner is the same, the details are different.

Q. How are they different? Let us be very precise and clear.

A. In those first years, that is what you are speaking of?

Q. That is correct.

A. As I say, we were a general partnership, and we considered total capital, including surplus capital, everything.

Q. In using the figures here for 1955, do you mean on the basis of each partner's investment in the \$1,325,000? A. Total, yes.

Q. In 1955 and in later years how was the rental income profit divided?

A. At that time there was a corporation. It was still divided on the basis of each partner's equity in the [230] assets of the partnership which were only machinery and equipment at that time. All

(Testimony of Max J. Kuney, Jr.)

other capital invested was surplus capital and was not considered, and any change in that surplus capital had no effect on the division of profits, which, I believe——

Q. Is it true or not true——

A. (Interposing): ——which I believe is still in conformity with this agreement.

Q. Is it true or not true that at all times you have endeavored to apportion the profits on the basis of capital investment? A. That is correct.

Q. One way or another?

A. As the capital investment changed, why, it would change like that.

Q. Have you been satisfied with this form of division of profits as trustee and as an individual?

A. It seems to me it would be quite clear cut and should meet some of the objections that we previously ran into or should meet them by defining capital, restricting it to the actual fixed asset investment and leaving no possible grounds for tampering.

Q. With the exception of the interest of the family partnership trust, has the Internal Revenue Service completed any audits for the year 1955 and later? [231]

A. We haven't had any reports. They have been out there from time to time working on it, but we haven't had any audit reports.

Q. When audits are eventually completed for the years 1955 and later years, will it be or will it not be necessary to make adjustment in your books?

(Testimony of Max J. Kuney, Jr.)

A. It depends on whether the audits agree with our books.

Q. And if they don't?

A. Then of course it will be necessary to make adjustments to conform. We will have to file amended tax returns to conform to the audit findings.

Q. Is it accurate or not to state that perhaps some time in 1961 or '2 you will be making adjustments affecting 1955 at this point?

A. It could be if there are any differences in the audit findings.

Mr. Toole: You may inquire.

Cross-Examination

By Mr. Biggins:

Q. May it please the Court, Mr. Kuney, sir, I take it in the heavy construction business over there in Spokane that the Kuney Company does deal with a rather large number of subcontractors?

A. Yes. [232]

Q. A number of which are partnerships?

A. Subcontractors, I assume some would be.

Q. Who meet their obligations to you periodically as they come due without any concern at all about their income tax status at the time? You are not concerned about the income tax problems of the subcontractors dealing with you, are you?

A. No, I am not.

(Testimony of Max J. Kuney, Jr.)

Q. And they are not interested a bit about your income tax problems, are they?

A. I presume not.

Q. And they have never inquired?

A. That is correct. It wouldn't be any of their affair.

Q. Now let us be very clear on these last two areas of testimony you have covered. What did I understand you to say was the original and basic understanding in 1952?

Do you have Exhibits 24 and 25 before you?

A. I did have.

Q. What was the understanding at that time on February 11, 1952, how partnership profits were to be divided? What did you say a few minutes ago?

A. By the total capital invested in the business.

Q. And at that time the amount of capital you had in the business did not equalize the amount of capital your [233] father had in the business, that is true, isn't it?

A. Well, that is right. I probably should back up.

Q. But nevertheless divided profits with him fifty per cent, that is true? A. Certainly.

Q. And not in accordance with the capital invested at all, that is true, isn't it?

A. (No response.)

Q. That is true, isn't it?

The Court: Answer the question.

Q. (By Mr. Biggins): That is true, isn't it?

A. Yes, sir.

(Testimony of Max J. Kuney, Jr.)

Q. Now, you were equally precise a few moments before that that you recall very vividly what was testified to on the Bible about how partnership profits were to be divided. Do you recall that testimony on that? A. Well, yes.

Q. What did you testify to a few moments ago how it was to be divided? What was the testimony you said you recalled very vividly?

A. I said I recalled it, but possibly you should refresh me.

The Court: Don't you now recall what it was that you said?

The Witness: What was the question I was [234]—question I was answering on the Bible, please?

Q. (By Mr. Biggins): He said, do you recall the testimony about the Bible where it provided about what the partnership agreement is? He led you. I didn't object, but then you testified, "Yes, I recall it vividly."

Now I simply inquire, Mr. Kuney, what do you recall so vividly? What was it that you recall so vividly? A. About the Bible?

Q. Yes, about the understanding or the agreement as to how profits were to be shared.

A. They were to be divided on the basis of the capital invested in the fixed assets of the partnership.

Q. All right. And that was what you testified to a moment ago, to be divided on the basis of the capital invested in fixed assets? A. Yes.

Q. Is that correct?

(Testimony of Max J. Kuney, Jr.)

A. Yes, I believe that is correct.

Q. All right. And if you care to examine journal entry four in the Bible, which I did read to Mr. Bowen, and where it states——

The Court: Let him have it so he will be satisfied you are reading it correctly.

(Whereupon, a document was handed to the witness by the Bailiff.) [235]

The Court: Can you give him the page or indicate what you are talking about?

Q. (By Mr. Biggins): Journal voucher four (indicating), Mr. Kuney.

A. Yes, I have it.

Q. Do you recall my examination of Mr. Bowen about what we call here the management directive where the Bible stated—do you see under “1,” “Active partners Max J. Kuney and Max Kuney, Jr., shall receive total compensation \$10,000 per year from partnership income to be divided equally between them and that the remaining income shall be distributed in proportion to each partner’s——” what?

A. “Capital investment in the partnership.”

Q. Now, do you recall in my examination of Mr. Bowen where I said, “Is it clear, Mr. Bowen, that this is the total, this \$1,325,000 is the total partnership capital?” Do you recall he said yes? Do you recall it or don’t you?

A. He may have said yes to that question.

Q. Well, your recollection isn’t vivid?

(Testimony of Max J. Kuney, Jr.)

A. Not completely. He probably did, though, if you say so, and I will take your word for it.

The Court: He is speaking about what he said here this morning. Don't you recall that? [236]

The Witness: I think he did, yes.

Q. (By Mr. Biggins): We distinguished most clearly the partnership capital, total capital investment in the partnership capital from the fixed assets in your testimony this morning, do you recall that?

A. I guess he did, yes.

Q. Now, in his testimony he said—his understanding was under this management directive from the Bible that income was to be distributed in accordance with total capital investment in the partnership.

Now, Mr. Kuney, what was your vivid recollection of the testimony that said it comes from fixed assets? Was your testimony inaccurate, or is there something in the record that I perhaps have missed?

A. No, that is my understanding of the capital invested in the partnership.

Q. I am not asking you your understanding. You said you had a vivid recollection of some testimony that said the distribution was on fixed assets and not total capital. I am inquiring now, Mr. Kuney, if I missed something in the record or was your recollection inaccurate? Have I missed something? A. I don't know.

Q. Now, we are satisfied that the Bible says, "Partners' Capital Investment"? You are satisfied now? [237]

(Testimony of Max J. Kuney, Jr.)

A. That is what the wording is.

Q. So we may be clear on some other testimony that was given this morning, you do recall, I believe, Mr. Bowen stating that he knew more about the books over there in Spokane than probably anybody else. Do you recall that? A. I recall that.

Q. Is it clear in your mind who wrote the Bible? Do you know who wrote the Bible?

A. My father made the basic entries.

Q. And he wrote that Bible in 1957, I believe?

A. Yes.

Q. Well, if you know, Mr. Kuney, if Mr. Wilson knows more about those books and adjustments than anything else, why did your father write the Bible, do you know? A. Mr. Wilson?

Q. Why did Mr. Wilson write the Bible—I am sorry, I have got the names all confused here.

The Court: Do you mean Mr. Bowen?

Mr. Biggins: Mr. Bowen.

Q. (By Mr. Biggins): Your father wrote the Bible, we are clear on that?

A. He prepared the adjusting entries which you refer to as the "Bible."

Q. It was Mr. Bowen who testified he knew more about the [238] accounts, he believed, than anybody else. Did you hear that?

A. Mr. Bowen is hired as an auditor and not as a bookkeeper.

Q. I realize that Mr. Petersen takes care of the books.

(Testimony of Max J. Kuney, Jr.)

A. I thought your question was why didn't he do the work instead of my father?

Q. Why didn't you ask Mr. Bowen to prepare the Bible? If you don't know, say so. Why did your father do it?

A. I think I do know. Normally we don't hire Mr. Bowen to do this kind of thing. He audits after they are done.

Q. Because the decisions have to be made, and you and your father make them, that is the reason?

A. And sometimes there are other corporate officers involved, too. That is the reason, yes. We have to run the business.

Q. I believe you will also recall that Mr. Bowen said in respect to the surplus capital accounts, which we were speaking of, and on redirect Mr. Toole asked him why they were used, and he said in effect, if you recall, "It is used—capital surplus accounts—it is used primarily as a basis for the method of determining income to be distributed to the partners." Do you recall that testimony?

A. Yes, I believe I do. [239]

Q. Is it accurate, is it true?

A. Yes, that is true.

Q. And you recall Mr. Coon testifying on the stand too, don't you, Mr. Kuney?

A. Mr. Coon, yes.

Q. And about the bank loaning the money and that?

A. Yes.

Q. And I asked him if it is true that the corporation ever pledged some of this property for

(Testimony of Max J. Kuney, Jr.)

the money that the corporation wanted to borrow at the bank? Do you remember a question such as that? A. Yes.

Q. And his answer was yes?

A. That is right.

Q. And that is true, isn't it?

A. That is true.

Q. And who does that property belong to?

A. It belongs to the various partners.

Q. But who is borrowing the money, the corporation?

A. The corporation is signing the notes on the money.

Q. And at that time did the children have any interest at all in the corporation? A. No, sir.

Q. Now, let us be clear on this, when I say "an interest in"—when I say, "who has an interest in the corporation," [240] who do you understand that I mean, say, in 1956? A. 1956?

Q. Who has an interest in the corporation?

A. Max J. Kuney, Max Kuney, Jr., W. R. Wiginton, and W. B. Petersen.

Q. If I say in 1956 who has an interest in the family partnership, what do you understand I mean?

A. My father and I, both as general partners and as trustee partners.

Q. Nobody else?

A. The family partnership, and that should be all.

Q. Excuse me? A. I believe that is all.

(Testimony of Max J. Kuney, Jr.)

Q. Where is Mr. Claggett? You did hear Mr. Coon say he thought he was a partner? You heard his testimony on that? A. Yes.

Q. You heard Mr. Henry's testimony that he thought Claggett was a partner?

A. Yes, I did.

Q. They were, of course, mistaken?

A. No, he is a special partner of the corporation. He shares in the profits of certain jobs.

Q. We are talking about the Kuney family partnership? A. You asked where he was.

Q. No, I didn't. I said the Kuney family partnership, who [241] do you understand has an interest in that?

A. I just said my father and myself both as partners and trustees.

Q. And, of course, when you filed the fictitious name—if you want to examine Exhibit 32—I believe it is Exhibit 35, Mr. Grant——

(Whereupon, a document was handed to the witness by the Bailiff.)

Q. (By Mr. Biggins): Now, on this certificate of firm name, which I believe you have before you, is dated March, 1953, isn't it? A. Yes.

Q. Do you see the date there? A. Yes.

Q. 27th of March? A. Yes, I see it.

Q. And that is your signature and that is your father? A. Yes.

Q. And up there above they are asking that the

(Testimony of Max J. Kuney, Jr.)

persons be listed, and you see the language, "having an interest therein"?

A. And their true and real names.

Q. And on this your name appears, doesn't it?

A. Yes.

Q. And your father's name appears there? [242]

A. Yes. They don't appear twice.

Q. And your father's name appears?

A. That is right.

Q. And there is nothing said about a trust?

A. No, it just means the persons conducting or intending to conduct the business or having an interest therein and their true names.

Q. And you used the expression "have an interest therein" a moment ago. You did include the children, though, didn't you, through you as trustee?

A. Included the trusts.

Q. Now, as I also understood your testimony before the noon recess, Mr. Kuney, the question was asked by Mr. Toole something like this, passing from the corporation now to the partnership—no, passing from the corporation now to the trusts, I am trying to read my shorthand here, was there a business purpose for creating the trusts, and you said no, there wasn't any business reason whatsoever.

We can go back if you don't recall.

A. Yes, I recall it.

Q. Now, wait a minute, it is true, speaking of the Bible again, and refer to it if you wish, that the Kuney family partnership was formed by the two

(Testimony of Max J. Kuney, Jr.)

adult Kuneys to reduce their income taxes while living, and to save [243] inheritance taxes at their death? That is true?

A. That is what that says.

Q. I know that is what it says, Mr. Kuney. It is true, that is what I am asking.

A. It is not complete.

Q. Shall I repeat it, it is not true?

A. I didn't say it was not true, I said it is not complete. That is what it says. It is true in part.

Q. Mr. Toole then asked—what do you mean by “business reason”?

A. Well, I wanted to take them in as partners, as I understood I was entitled to under the law.

Q. And when you said, “under the law,” you meant under federal income tax law, didn't you?

A. I was thinking of the 1951 Family Partnership Act.

Q. Now, it has been clear to you all along, I take it, Mr. Kuney, that the federal government has never questioned your right, power, and authority at all to make these gifts to your children? You have understood that, haven't you?

A. They haven't questioned the gifts.

Q. That is true, and do you understand now, don't you, that no matter what happens in this case, that that property still is your children's, do you understand that? [244]

A. I would assume so.

Q. The government has never tried to interfere with your family plans on what you do with your

(Testimony of Max J. Kuney, Jr.)

property? They never have to this moment, have they? You don't want us to get the impression they have?

A. They recognize your right to make a gift and pay taxes on it, certainly.

Q. And the only question at all we have here is the income taxes to be paid on the money earned under these agreements we are talking about, that is clear to you too, isn't it?

A. That is my understanding, yes. That is the question.

Q. And in talking this over with Mr. Wither-
spoon, or whoever your advisor may be, you knew and were advised and understood that you could create any kind of partnership you wanted under state law to be recognized under state law? You knew that, didn't you?

A. That wasn't all I wanted.

Q. And the additional thing you wanted is, as set out here, the Kuney family partnership was formed by the two adult Kuneys to reduce their income taxes while living and to save inheritance taxes at their death? That is at least part of it?

A. That is part.

Q. Now let us speak about your other testimony earlier when [245] you mentioned your ambitions, and very proper, sir, I have children too—your ambitions for your son, Jeff. Now, in speaking of these trusts, Mr. Kuney, I believe you said that one of your purposes was that if something should happen to you, it will not only take care of your chil-

(Testimony of Max J. Kuney, Jr.)

dren but the first person you mentioned, sir, was your wife, do you recall that?

A. In speaking of the trusts? I think what I——

Q. (Interposing): If something happened, and you were speaking about the work that Wiginton would do, the work Mr. Petersen would do——

A. I believe, and you may correct me, but I think the record should show what I was speaking of was the fact that the family partnership had only an investment in fixed assets, and my personal interest, which would pass to my wife, would still remain in that family partnership, which would be a risk-free thing and a good business. I was not speaking of my wife ever getting anything out of a trust, because that is impossible.

Q. No, but Mr. Kuney, is it clear that the trusts are not the only partners? You have an interest in the partnership, don't you? A. Certainly.

Q. And if anything——

A. I was speaking of my interest. [246]

Q. That is part of your estate?

A. That is right.

Q. Would you want to preserve and protect for the benefit of your wife if anything happens to you?

A. My wife and children, yes.

Q. And you examined and discussed with particular care the powers of the trustee and what would happen to the money, do I remember that correctly? A. Oh, yes, that and other things.

Q. And you noticed, of course, then in reading the provisions set forth in that trust, that if young

(Testimony of Max J. Kuney, Jr.)

Jeff happened to marry—and you do expect Jeff to grow up and get married?

A. That is correct.

Q. If he should grow up and get married and fail to have issue before his death, fail to have children, absolutely nothing is provided for young Jeff's wife, you knew that?

A. I am aware of that.

Q. All right. Now, my question, Mr. Kuney, is this, was there any idea—your idea or your father's idea or did you simply take the suggestion of a lawyer?

A. It was considered—Jeff's wife—he doesn't have one yet—I don't know her, and my greater affection right now might be toward my known daughter, because she would [247] succeed to his interest in the event Jeff died.

Q. Was it your father's idea or your idea or a lawyer's idea?

A. I can't say. I can't say we discussed it, brought the matter up. Who brought up the point first in suggesting nine years ago, I can't remember.

Q. But you became a partner when you became twenty-one, I believe, around 1940, with your father?

A. '39.

Q. Were you married at that time?

A. No, sir.

Q. Now, in providing for Jeff, as you say, your ambition was to bring him into this partnership?

A. Yes, I hoped he would.

Q. Now, as I read the instrument, which you

(Testimony of Max J. Kuney, Jr.)

said refreshed your recollection, as I understand it, he has no right to anything at least until he is twenty-one unless your father, Max, Sr., decides he can have some of it, isn't that right?

A. That is right.

Q. And in fact, your father has absolute power of discretion, or did have when the instrument was signed, to distribute all of the income if he deems necessary to your mother and to her parents?

A. While they lived if the need was there. [248]

Q. If he thought the need was there?

A. Yes.

Q. Regardless of what you might think?

A. That is true. He is the trustee.

Q. And give it to young Jeff only as and when he thought necessary? A. True.

Q. Now, I believe the first distribution made out of that was around 1952, you testified?

A. I think that is right.

Q. And to refresh your recollection, isn't it true that a tax computation was made first in 19—March, 1953, and then the distribution was made in April, 1953, after the tax computation was made? Does that ring a bell, or don't you remember?

A. No, I don't agree with that.

Q. You don't agree with that?

A. Not on the dating. I believe you will find that there were tax returns filed showing that distribution timely.

Q. Where would it be?

A. Our bookkeeping entry was made on April 3 when Petersen got it posted.

(Testimony of Max J. Kuney, Jr.)

Q. Let us be clear on "bookkeeping." When you mean "posted," we speak of posting from the journal to the ledger, that is posting? [249]

A. Even the journal entries were typed and taken off a worksheet, and possibly that is what that dating is. You will find the tax returns that were mailed on time on March 15 reflecting those distributions were made.

Q. Well, let us get at it this way, then, if we may. If you will look at Exhibit 27, sir, you will see, I believe, as I recall, in that letter that your father said that if he wanted any other distributions in this trust, that he would advise you in writing before the end of the year 1952? Isn't that in the last paragraph of that letter? Do I recall it accurately? A. No.

Q. May I see it?

A. The word "instruction" is not in writing.

Q. Does it appear at the bottom of the document, "If, as trustee, I deem it advisable to make any further distributions from the 1952 income of the trust to other persons eligible to receive such distributions, I will issue instructions prior to the end of the year 1952." That does appear here?

A. That appears.

Q. And no such instructions were given prior to the end of the year 1952, were they?

A. I can't recall now, but there were further distributions made for 1952, so I might have assumed they were. [250]

(Testimony of Max J. Kuney, Jr.)

Q. And on the books of the company those distributions follow several adjustments made January, February, and March, don't they? Do you recall?

A. Well, if you say so, I will assume so because I have looked and seen that they got the dating on the journal vouchers—was clear after tax returns had been filed and correspondence had been written. So it certainly indicates that the gifts were made ahead of the bookkeeping that got us caught up.

Q. And I believe your father testified that that ten thousand was very necessary in order to provide for the college education of your children? Was that the reason for this distribution, the college education? You heard your father's testimony?

A. You are on the distribution to who, now?

Q. The distribution made up at this first thirty thousand in their so-called personal account?

A. I assume he was speaking of why he made the distribution.

Q. But you and he agreed to work—to make a distribution before any distribution would be made at all, that is true, isn't it?

A. We discussed it, yes.

Q. And then agreed together—or do nothing if you couldn't both agree, then do nothing?

A. Not necessarily, sir. [251]

Q. Well, do you recall the letter that appeared in the Bible where we are talking about a gift, Mr. Kuney?

A. That has nothing to do with the trust, no.

(Testimony of Max J. Kuney, Jr.)

Q. I appreciate that. I am going to ask you about the letter now.

It is true you would not even agree to give gifts to your own children unless—do you remember the letter?

A. I remember that letter, and it has to do with personal gifts outside of the trusts.

Q. And depending on what your father might do, it would also depend on what you might do in in this letter?

A. In that case, that was true. It is spelled out clearly.

Q. Well, you seem to know all about it. What is the story behind this letter, Mr. Kuney?

A. That year we discussed the advisability of giving gifts to our children.

Q. What did the children need money for then?

A. Nothing.

Q. All right. Why did you discuss the advisability of giving them this money? It was around \$9,000, wasn't it?

A. We talked about whether or not we would feel in the financial position to take advantage of the \$3,000 annual exclusion which is allowable, and decided to do so [252] that particular year. I didn't go for it for '55. I did for '56, and I haven't since.

Q. It is clear, then, at least on this letter that the personal tax consequence to you and your father depended on whether or not a gift would be made to your children, not their needs, but your own tax?

A. Certainly.

(Testimony of Max J. Kuney, Jr.)

Q. All right. Now, your father, you know, has power to accumulate all income in these trusts for your two sons, for Caroline and Jeff, until they are twenty-one? Do you know that? A. Yes.

Q. And that after twenty-one he still has power whether or not to give them any income but has discretion whether or not to pay out for it, do you know that? That is Exhibit 2, if you want to look at it.

A. I believe he has got the power to distribute income to them at any time, hasn't he, whether they are twenty-one or not, but that he can't distribute principal until they are twenty-one, and he has to distribute income when they are thirty, isn't that right?

Q. You got the first two parts, "may distribute income until they are twenty-one."

A. Until they are thirty, I believe.

Q. Well, there are two ways to look at the instrument, and [253] he has power to distribute both income and corpus, if need be, until they reach thirty.

Let us go back to your way. He can distribute income until they are thirty, can't he, as he sees fit?

A. That is correct.

Q. And after they are twenty-one and until they are thirty, he may distribute corpus?

A. After twenty-one until they ninety he may distribute corpus.

Q. After they are thirty he must pay out current income to them? A. That is correct.

(Testimony of Max J. Kuney, Jr.)

Q. But he need not pay them out anything more than current income?

A. He does not have to.

Q. After they are thirty?

A. That is correct.

Q. Now, if your ambition was to bring Jeff into the business, why do we have all these strings attached until he passes thirty?

A. Solely for his own good because of his age and unknowns at the time the trusts were drawn.

Q. When you say his own good judgment, what your father thinks best for him even after he is thirty?

A. Whoever the trustee may be when Jeff is thirty. Perhaps [254] my father may not be here, in which case I would be successor trustee.

Q. And the trustee after your father passes away is who?

A. I would become successor trustee if I accept. If not, the Spokane and Eastern Branch of the Seattle-First National Bank.

Q. There is certainly nothing in writing in anything we have seen or heard about to this time in this proceedings about any agreement to make Jeff a partner in this business, is there?

A. As an individual, no.

Q. And all we have seen is the strings attached on this trust that he may get the income after thirty?

A. He must get the income.

Q. He must get current income, but nothing else?

A. Yes.

(Testimony of Max J. Kuney, Jr.)

Q. Now, the last two batteries, if I may, and would you get Plaintiffs' Exhibits 32 and 33, I believe, and take 32—we will just take Exhibit 32—my last battery, sir, you will know where I am going—my last battery is going to be the income tax trouble you mentioned with Mr. Carney. I certainly want to cover that.

Before we do get to that, you do recognize Plaintiff's Exhibit 32, the financial statement as of December 31, 1954? [255] A. I do.

Q. That is your signature on it?

A. That is.

Q. And turning over to the next page, you have seen this letter? A. I have.

Q. And turning over to the third page, you have seen that? A. Yes.

Q. And on the third page it says and accurately states, the last sentence of the first paragraph of "Plant and equipment," it says, "The firm owns 206 pieces of major equipment having an original cost of \$1,230,702.38, which it uses in its business of heavy grading and excavating, rock crushing, paving, general building and electrical contracting."

You do see that sentence? A. Yes, sir.

Q. All right. And it accurately states that the firm is using all 206 pieces of equipment, that is accurate? A. Which it uses, yes.

Q. And the cost was over a million dollars?

A. The cost, yes.

Q. Now, at this point, speaking of the equipment used by the business, may we clarify, establish, and

(Testimony of Max J. Kuney, Jr.)

set aside once and for all what was the agreement between the family [256] partnership and the corporation on the use of equipment and fixed assets? What was your understanding of that agreement?

A. The agreement between the family partnership and the corporation as of what date?

Q. It did change, didn't it?

A. It certainly did. We had to change it.

Q. Well, let us say in 1952.

A. In 1952 there was no corporation.

Q. I am sorry. 1953 when the corporation was first formed. Of course, it is around May, I believe, or June first, 1953.

A. May 1 or April 30th.

Q. June 1, 1953?

A. Whatever it may be. Rental in those years until it was changed by the Bureau was computed, as I testified before, on the basis of fifty per cent of AED rental on the actual use records. Distribution was on the basis of capital equities to the capital at that time.

Q. And perhaps you will recall with me, because you said you did look at some of the journal vouchers, you will recall that we had in the profit computations machinery and equipment listed under assets and land and buildings, do you recall that?

A. Yes. [257]

Q. And that across from that assets we would have equipment with above it, "User, MJK Company." Do you remember entries something like that? A. Yes.

(Testimony of Max J. Kuney, Jr.)

Q. "User, MJK Company."

A. "Fifty per cent," or something, "MJK."

Q. And, "User, Agutter Company"?

A. Fifty per cent, correct.

Q. Yes, it is fifty per cent. Now, what does the word "User" mean there?

A. That is the firm that is using the equipment that we, as partners, had an equity in, and the reason for the fifty per cent, that is all we owned in dollar value of that equipment.

Q. Please feel free to ask that I approach closer if you want to see this.

And the profit computations that we are making for the distribution of income between the adults and the trust is on the basis of the machinery and equipment used by the several businesses?

A. That is really—you can say—the other fifty per cent of, say, Kuney-Johnson was owned by Lloyd W. Johnson. We couldn't have very well paid the kids rent on that.

Q. May we be clear on this, it is equipment used, not [258] equipment or assets not used?

A. That is right, that is all used.

Q. It is used where we make this profit computation? A. Yes.

Q. Now, you are aware, I take it, being somewhat familiar with these tax laws, of the difference between property held as an investment and property used in the business? You are aware of that distinction, or are you?

A. Well, I can see that you can classify prop-

(Testimony of Max J. Kuney, Jr.)

erty as to whether you consider it to be an investment or consider it to be used in the business.

Q. May I be clear here that the property we are speaking about in determining this profit computation is property used in the business, is that right, or is that wrong?

A. Does that include—I don't know just what you are talking about. I think possibly that may include some investment. I don't know. Let me take a look.

Q. Perhaps Dun & Bradstreet, Exhibit 32, may help if you want it, but it is clear that it is property used by those businesses?

Mr. Toole: I don't know what Dun & Bradstreet, Exhibit 32, is.

Mr. Biggins: I am sorry, the financial statement identified as Exhibit 32.

Mr. Toole: It has nothing to do with Dun [259] & Bradstreet.

Mr. Biggins: That is right. I was mistaken.

A. Well, this is a schedule of fixed assets. The partnerships put it this way, and this is a schedule of the partnerships' total fixed assets, and whether they be rental——

What you are speaking of here is major equipment, which does not include land and buildings?

Q. (By Mr. Biggins): Look at Exhibit 32 a moment with me.

A. This consolidates several types of fixed assets.

Q. Look at Exhibit 32. You do include in Exhibit 32, if you will turn to Page 9, "Machinery and

(Testimony of Max J. Kuney, Jr.)

equipment, Schedule I," and you see the various items going over to Page 10? A. Yes.

Q. And going from Page 10 to Page 11?

A. Yes.

Q. And then on Page 11 we have totals, "Heavy construction division," do you see that?

A. That is correct.

Q. That is the total of assets used in the heavy construction part of the business? A. No, sir.

Q. What is it? [260]

A. That is the value of the equipment used in the heavy part of the business. If you will turn to Page 11 you will see the land and buildings held for business use, which are also fixed assets, with a further value on them.

Q. All right. I will take your characterization. But you do the same thing for the other divisions, don't we, the electrical division and the general building?

A. Yes, it is a consolidated statement. It has got everything in it.

Q. When we come to the very end of this on Page 12, we have there, "Land and buildings held for investment." Do you see that?

A. Correct.

Q. And that is not assets used in any of these heavy construction businesses, electrical business, or any of the others, it is, as stated here, "Land and buildings held for investment"?

A. "Schedule K," that is correct.

(Testimony of Max J. Kuney, Jr.)

Q. And that is the property located in San Francisco? A. That is right.

Q. And that is the reason that the Bible was changed in the amended return?

A. Because they forgot to get it included.

Q. Because they put finally in "Land and buildings held [261] for investment" in the fixed asset account? A. It is the fixed assets, sir.

Q. But not used as indicated on your journal vouchers?

A. There is nothing said about the nature of the fixed assets held by the partnership.

Q. My question will be a simple one, Mr. Kuney——

A. As to my requirement that they be used in the construction——

Q. My question will be a very simple one, after the Bible was written by your father, the accountant restored to the fixed assets and capital accounts, which had previously been classified in your financial statement of '54, land and buildings held for investment, that is true, isn't it?

A. It had been considered in the rental for 1954.

The Court: You must answer the question.

A. Yes, that is true. I am sorry, Judge. Yes, sir, it is true.

Q. (By Mr. Biggins): At the time your father prepared the Bible he excluded the land and buildings held for investment and only used the ma-

(Testimony of Max J. Kuney, Jr.)

chinery, equipment, land and buildings used by the going businesses? That is also true, isn't it?

A. That was discovered——

The Court: Well, no, is it true? [262]

A. Yes, it is true.

The Court: Please answer the question.

The Witness: I am sorry, your Honor. Yes, that is true.

Q. (By Mr. Biggins): Looking at Page 9, if you will with me, the very first item we see that shovel bought in 1936 for \$30,000?

A. Yes, sir.

Q. And we see under it we placed an engine in 1947 for \$6,000?

A. That is correct.

Q. Making an original purchase price of around \$36,400?

A. That is right.

Q. Now, at this time no rent was being charged on that piece of machinery by the partnership to the corporation although the shovel was—Strike that question.

This shovel was being used in 1954, wasn't it?

A. I believe so.

Q. All right. Was any rent being paid on it by the corporation to this partnership?

A. At this time, yes. It was listed in that schedule at fifty per cent of AED rates whether it had book value or not. The change was made for other reasons.

Q. Let us go to the later time. What changes did we have after the AED? [263]

A. That is when we tried to find a schedule that

(Testimony of Max J. Kuney, Jr.)

would meet with the satisfaction of the Bureau of Internal Revenue—I mean a formula.

Q. Let us take that up. You were the one, just as your father testified, that took care of the depreciation rates and the rental rates? That is true?

A. Yes, I believe so.

Q. And you did refresh your recollection on all this just as you said a few minutes ago? That is also true, isn't it?

A. That is also true, yes, sir.

Q. And the heart of the controversy we had at that time with the Internal Revenue Service, personified by Mr. Carney, was that the amount of rental charged was unreasonable? That was the heart of the matter you were talking about?

A. The first contention was that no rental was allowable at all.

Q. Well, depending on the business entities and recognizing the corporation now, as you said it was, the question was, what was the proper amount of rent to be charged?

A. Yes, after these other matters were resolved. That was the last one.

Q. And Mr. Carney said the rent you people were charging was much, much too low? He wanted to raise it? That is what he wanted to do, isn't it? He wanted to increase [264] the rate that the corporation was paying to the partnership?

A. I believe his final result was to increase it about ten thousand one year——

The Court: The question is, what was he assert-

(Testimony of Max J. Kuney, Jr.)

ing, Mr. Kuney. Please pay close attention to the question, and then we will get along so much better.

The question, as I understand it, was, was Carney asserting that a higher rental should be paid than you provided theretofore? Was he or wasn't he?

The Witness: At the time, sir, he was asserting that the rental was not correct. I was not sure of what his contentions were, whether it was too low or too high, until he finally turned up with an answer. That is my best memory now.

Q. (By Mr. Biggins): All right. You do understand after he did come up that he thought that this rental was not an arm's length transaction, you do recall that? A. Yes.

Q. And that the rental was unfairly low, do you remember that? A. He adjusted it upwards.

Q. Now, if the rent was increased as the result of anything [265] the Revenue Service might do, that would mean that further income would be distributable to the partners then, wouldn't it?

A. That would be correct.

Q. And if further income were distributable to the partners, you would have to pay more taxes, wouldn't you? A. Yes.

Q. And you realized that and appreciated it? You knew that? A. Yes.

Q. But there was nothing, nothing at all that Mr. Carney or anybody in the Service told you that would effect any change of anything you thought was due your children? They never tried to tell

(Testimony of Max J. Kuney, Jr.)

you at all how much should be given to the children, did they, for rent or interest or otherwise?

A. Yes, I think that was the effect of the examination.

Q. And the only reason this thing was held up at all was because you and your father wanted to make clear what your personal income tax consequences were going to be before we finally realized the agreements on what should be given the children? Now please fence, that is true, isn't it?

A. No, I don't believe so.

Q. Well, then, why didn't you finalize and crystallize what [266] you and your father were willing to give the children before you straightened out your personal tax matter with the Service? Why didn't you do it?

A. Our tax matters were both personal and as trustees engaged in a family partnership. You are attempting to create an occasional gift pattern, which I don't think—we weren't contemplating that. We weren't contemplating that.

Q. As trustee——

A. (Interposing): You see, we are running this family partnership as partners and as trustees for the benefit as partners of ourselves and trustees for the trusts, and it was a business, it was our duty to straighten out its income tax affairs.

Q. And so you held up all of this determination of what goes to the kids until that was straightened out?

A. We held up those determinations until some

(Testimony of Max J. Kuney, Jr.)

decision was reached that would let us arrive at a pattern which we thought would meet approval.

Q. Have you ever in any of your other business dealings ever held up a business deal such as that with other partners, other individuals, other corporations, until their tax affairs were straightened out? A. Yes, sir.

Q. Who and when? [267]

A. Techler, Agutter, Kuney-Johnson.

Q. In other words, the only other exception is in which the family partnership had at one time an interest?

A. That is the only business we have. You asked if we ever held up any transactions on other firms. That is all we are interested in.

Q. You do business with a number of subcontractors?

A. We couldn't affect their taxes, sir, their tax returns.

Q. You couldn't what?

A. I say we couldn't affect the filing of their tax returns.

Q. Who is "their"?

A. The subcontractors you are speaking of.

Q. You wouldn't expect to either?

A. I don't know what conduct we could take that would affect them.

Q. But you did in the case of this partnership with your children, you held up their distribution for years depending upon what the tax consequences were going to be here?

(Testimony of Max J. Kuney, Jr.)

A. Pending settlement of the initial years.

Q. And the argument at that time must be clear on this, the position of the Service was at that time that the rent was not high enough, the rent you were charging was too low?

A. I really didn't know until I saw the final—until I [263] saw the Revenue Agent's report three or four years later.

Mr. Biggins: That is all.

The Court: I believe that is all, Mr. Kuney.

Mr. Toole: Could I clear up one point, your Honor?

The Court: Yes, go ahead.

Redirect Examination

By Mr. Toole:

Q. What is a subcontractor in the subcontracting business, Mr. Kuney?

A. He is a person who takes, we will call it, a subcontract. He is an outsider unrelated who performs a portion of the work in a general contract, which we would hold, as distinguished from a straight supplier or a supply contractor. He is one who actually performs labor with his own crew on his own payroll at the site of the job instead of just supplying materials, and he takes a fixed price for his work.

Q. A subcontractor isn't a subpartner, is he?

A. There is no business relationship other than the contract relationship with any subcontractor.

(Testimony of Max J. Kuney, Jr.)

He signs the contract. He would have the same relationship with us as we have with the U. S. Government when we sign a [269] contract with them.

Q. Is there any interrelationship between income tax problems of the Kuney Company as a general contractor and the subcontractor?

A. None at all.

Mr. Toole: That is all.

Mr. Biggins: If the Court please, I did omit a matter.

The Court: Go ahead.

Recross-Examination

By Mr. Biggins:

Q. Could you look for a moment with me, Mr. Kuney, at the income tax return for the partnership for 1957 or any of them there? I happen to have 1957 before me, Exhibit A. Could you turn to what I believe is the last page, which is Schedule D, the gain and losses from sales or exchanges of property?

A. Schedule D?

Q. I believe it is the very last page, Mr. Kuney.

A. I got the schedule on about page 3.

Q. These are assets that had been used in the business up until the date indicated as disposed of or sold in this schedule, that is true, isn't it?

A. Yes. [270]

Q. Now, the first item there we have a Euclid truck that cost \$55,750—excuse me, a Euclid truck that cost \$8,600 approximately, don't we?

(Testimony of Max J. Kuney, Jr.)

A. That is correct.

Q. Which had been completely depreciated on the books of the partnership, the schedule right next to it?

A. Yes, I am just looking to get the headings up here.

Q. And it was sold for \$5,750?

A. Yes, sir, that is right.

Q. And we have another Euclid truck that cost \$14,800?

A. Yes, sir.

Q. Completely depreciated on the books and sold for \$5,750?

A. Yes, sir.

Q. And another Euclid truck for \$6,750 completely depreciated and sold for \$5,750?

A. That is right.

Q. Another Euclid truck, the same story?

A. That is right.

Q. And a Studebaker truck you purchased for \$2,000 and completely depreciated and sold for \$250?

A. That is right.

Q. And also the Chevrolet truck and the Ford ranch wagon?

A. Right.

Q. And the Cadillac?

A. Right. [271]

Q. And the Chevrolet truck?

A. Right.

Q. Two Chevrolet trucks?

A. I just got one more Chevrolet truck.

Q. I got the Chevy, No. 323.

A. Right. I got that one.

Q. All right. Now, there is a Ripper?

A. That is right.

(Testimony of Max J. Kuney, Jr.)

Q. And we got some kind of a power unit, \$10,500? A. Yes.

Q. A steam cleaner? A. Right.

Q. Another Euclid truck? A. Yes.

Q. All the capital gains realized, at least in issue, had been completely depreciated on the books of the company, hadn't they?

A. The capital gains haven't been depreciated.

Q. I am saying the depreciation has been claimed and allowed, and there was absolutely no book value on any items sold here? A. Not one.

Q. Not one?

A. Not one. You picked a good one.

Q. Now, in the agreement you ultimately reached or the [272] understanding that you had on the rental of this equipment by the partnership for the corporation was geared to the book value?

A. That is correct.

Q. And if we look at the 1954 financial statement, to look at the total on Page 2, for instance, Page 3, you did establish, did you not, for 1953—December 31, 1954, that the firm owned 206 pieces of major equipment having an original cost of \$1,230,700.02? That has been established, right?

A. That is correct.

Q. And the book value of that property at that time, if you take a look on Page 11, I believe, was less than two hundred thousand dollars?

A. Two hundred one thousand.

Q. Whatever figure you suggest, I will accept.

(Testimony of Max J. Kuney, Jr.)

A. Yes, a hundred forty, thirty-five, and twenty-six.

Q. Now, we have established that even though an asset is not on the books with a value, it is being used at this time in the business, we have established that? A. That is correct.

Q. We have also established in part, I take it, by the 1957 return that many of these pieces of equipment that have no book value on the books have a substantial market value? [273]

A. In some instances. The ones you see on the return are the selective group that had some market value.

Q. Take the shovel and dragline, the very first one, the purchase price was around \$36,000, wasn't it? Do you remember that? A. Yes.

Q. The very first item? A. Excuse me?

Q. Page 9. A. Yes, sir.

Q. \$36,000. We sold that in 1958 for \$20,000, do you remember that?

A. I remember selling one in 1958. It could be that one.

Q. For around \$20,000?

A. I don't remember which one I sold or whether it is the one that says, "1949, one shovel."

Q. The one in 1949, to refresh your recollection, that was sold for about \$35,000?

A. That is what I was thinking.

Q. And the book value here is less than \$3,000?

A. What?

Q. The book value.

(Testimony of Max J. Kuney, Jr.)

A. \$7,091, I think. You are looking at that Lima 1201 diesel. I was looking at the other, the Northwest.

Q. The book value is less than \$3,000 in [274] 1954? A. That is right, on the 1201.

Q. That was sold five years later, January 14, 1959, for \$35,000. A. Very true.

Q. And I take it, it is true, as I suggested, Mr. Kuney, that all of this equipment is not—it is all not only being used, but also, even though it has no book value, it has substantial economic value?

A. Some does, some doesn't at this stage. Some of that stuff has been scrapped off.

Q. Some what?

A. Some items have been just scrapped and lost. I mean some of those things actually disappear.

The Court: No, not any of these items here listed.

A. Not to that date, but I mean I thought the question was "still has value." There are some of the things that just—we have them that are no longer listed.

Q. (By Mr. Biggins): My final two related questions, the rental agreement you ultimately adopted was geared to the book value?

A. That is correct.

Q. And applying that, if we may, to this statement, because it is before us, that would apply to—not to the million two hundred thousand [275] dollars? A. That is correct.

Q. But to the \$200,000?

(Testimony of Max J. Kuney, Jr.)

A. That is correct.

Q. Which means rent is not being paid on most of the equipment that is being used, that is true, isn't it? Most of the equipment that is being used is rent free under this agreement you are talking about?

A. That is entirely correct.

Mr. Biggins: That is all.

The Court: Is there anything further?

Mr. Toole: Yes, your Honor.

Redirect Examination

By Mr. Toole:

Q. Is the equipment being used without payment of rent? Is that what I understood you to testify?

A. The older equipment which has no book value, of course, automatically does not directly receive rental payment. We consider it to be a fair arrangement in that it requires the user corporation to excellently maintain that equipment and keep it up so that it has useful life after its book value has expired.

Q. Is it true or not true that this depreciation plus thirty per cent is the manner of computation of rent for all of the equipment? [276]

A. It is the total book value of all the equipment.

Q. Would you like to have some arrangement with the Internal Revenue that they stop questioning it so you could compute it once for all?

A. That is what we thought would satisfy them.

(Testimony of Max J. Kuney, Jr.)

The result of this 130 per cent application approximated Mr. Carney's final findings. You see what he did, he changed our rental for two years by \$4,800. It was inconsequential, but we didn't realize that it was going to be inconsequential. We didn't know whether he had it high or low. When we got the word, we took a look and devised a formula.

Q. The formula appears to be under criticism by the Internal Revenue Service this afternoon?

A. It does.

Mr. Toole: That is all.

The Court: Is there anything further?

Mr. Biggins: No.

The Court: That is all, Mr. Kuney. Step down, and you are excused.

(Witness excused.)

Mr. Toole: The plaintiff rests.

The Court: Ladies and gentlemen, we will have the afternoon recess at this time.

(Whereupon, the jury withdrew from the courtroom.) [277]

Mr. Biggins: The government now moves to dismiss on the grounds of failure of proof, and wishes to file with it a written motion for directed verdict.

The Court: I have very serious questions about whether or not this motion ought not to be granted, but in view of the fact that we have taken this much time to present the matter thus far to the jury, the motion will be denied with a specific reservation

that the Court will consider the motion further following the verdict if the matter requires any further consideration.

Now, I will expect you to go forward with any additional proof or consider whether you want to put any proof, and then depending on how long that is, I think what we will do is take the argument this afternoon, and I will then charge the jury the first thing in the morning.

Recess.

(Whereupon, a short recess was taken.)

Mr. Biggins: We have some very brief testimony, your Honor.

The Court: Put it on, please. [278]

FRANCIS A. CARNEY

called as a witness on behalf of the Defendant, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name, sir.

The Witness: Francis A. Carney, C-a-r-n-e-y.

Direct Examination

By Mr. Biggins:

Q. Where do you live, Mr. Carney?

A. I live in Spokane, Washington.

Q. And for how long?

A. I have lived there continuously since World War II.

(Testimony of Francis A. Carney.)

Q. And your business or profession, Mr. Carney, what is that?

A. I am an Internal Revenue Agent with the Internal Revenue Service.

Q. And have been for how long?

A. Eleven years in December.

Q. And in your employment capacity as Revenue Agent did you have occasion to examine the tax returns of Mr. Kuney and the various corporations for the years involved here? A. Yes. [279]

Q. Are you the agent that was mentioned in the testimony here as Frank Carney? A. I am.

Q. Now, please pay attention to my question now and to the limitation in my question, Mr. Carney, because I don't want to rehash the whole thing.

Did you hear the testimony about the dispute as to the rentals involved in these years? Did you hear that testimony? A. I did.

Q. Were you at the conferences to negotiate with these people on the rental problem discussed?

A. I was.

Q. What was the problem there, and will you relate very briefly in your own words what was this dispute about the rent?

A. After my examination of the books and records of both the corporation and the partnership, and comparing the income and expense over a period of one or two years, of two years in this particular, I had come to the conclusion that the corporation had not paid the partnership as much rental as it would normally pay doing business with a stranger,

(Testimony of Francis A. Carney.)

or, as we say, on an arm's length basis. My finding was that the partnership had not received enough rental for the equipment used by [280] the corporation during the corporation's fiscal year ended April 30, 1954. My finding was that the corporation had paid some \$29,000 less rent to the partnership than in my judgment it should have paid.

Q. When you say \$29,000 "in my judgment," were you trying to give them the benefit of the doubt or not the benefit of the doubt?

A. Yes, I did give them the benefit of the doubt because in my computations I considered the fact that the corporation also maintained the equipment and went to some expense, and I made a thirty per cent allowance for that item or for that element of expense. In other words, I reduced the \$29,000 down to what I thought the corporation should have paid in addition to what they did, considering all of the other factors.

Q. Now, being very careful to note my question again and its limitations on the rental issue, the position in your examination was that they had not paid enough rent, do I understand that correctly?

A. That was my position.

Mr. Biggins: That is all.

The Court: Cross-examine, please.

Mr. Toole: No inquiry.

The Court: That is all, Mr. Carney. Step down.

(Witness excused.) [281]

The Court: Call another witness.

Mr. Biggins: The government rests, your Honor.

The Court: Very well. Ladies and gentlemen, we are going to go ahead with the argument of the case this afternoon, and then I think that will carry us to a point where we will suspend and have you come back in the morning, at which time I will give you the instructions in the morning, and you will have the case the very first thing. I think you would all find that more agreeable, although some of you might want to be finished tonight. But in any case you will get the case the very first thing in the morning, which should give you ample time to attend to your duties in connection with it without interfering with your affairs unduly.

Now, if you will take just about a five-minute recess, then we will be ready to go forward. I wish to offer my apologies for having you run up and down the stairs, but I thought there would be a little more testimony than this.

(Whereupon, the jury withdrew from the courtroom.)

Mr. Biggins: If I may indicate for the record, I gave to Mr. Grant the renewal of my motion for directed verdict. [282]

The Court: The record will show a motion of defendant for a directed verdict has been interposed at this time, and the same ruling will be made thereon as was made to the motion to dismiss; namely, that it is denied, exception allowed, with the reservation that the Court will give it further

attention if the verdict in the case indicates it needs to be considered further.

(Whereupon, the Court advised counsel as to the nature of the jury charge.)

(Whereupon, with the jury present, oral argument of counsel was rendered.)

(Whereupon, at 4:35 o'clock, p.m., the court recessed.) [283]

Wednesday Morning

(Whereupon, on Wednesday, November 23, 1960, at the hour of 9:45 o'clock, a.m., all counsel and the jury being present, the following proceedings were had, to wit:)

The Court: Ladies and gentlemen, as I explained to you yesterday, the next phase of the trial consists of the instructions of the Court to the jury concerning the law applicable to the manner in which the jury conducts its deliberations, and the principles of law upon which the facts of the case are to be considered and applied in reaching the verdict. I think I mentioned especially to you at the time that the case started that in every case where a jury participates in a trial, it is the function of the jury to decide the facts, and in that field the jury are the final and absolute authority. The judge may, if he sees fit, in this court, comment about the facts or suggest to the jury wherein he, the judge, thinks the weight of the evidence may lie. But even if the judge does that, the jury are not obliged to agree

with the judge on questions of fact. Indeed, they are obliged to follow their own judgment and intelligence and experience on the matter of facts, and so it is here. [284]

On the other hand, with respect to the matter of law, the principles of law, there the jury are obliged to accept what the judge says the law is and apply those principles as best they can to the facts they find from the evidence in the case.

I am not going to comment about evidence or the facts and have not consciously or intentionally done so throughout the trial, nor will I do so in this charge for the reason that the basic fact issue here is one that I am well satisfied you twelve people, who will sit upon the case, are as well or better able to consider and decide than I as an individual would be. The twelve of you will have a variety of experiences in life far beyond anything that any single individual could have, and that, of course, is the virtue of the jury system. It brings a wide variety of talent and experience and ability into the matter of resolving fact issues, which it is thought by the law are peculiarly questions for lay people with practical experience in life to settle and determine. Therefore, if it seems to you that anything I have said or done during the trial or in the giving of these instructions is intended to incline you one way or another on any fact question, please be sure that you must have misunderstood or misinterpreted what I have said or done, because I [285] do not intend it to be such. I think this issue is a simple issue which you will have no difficulty at all in

resolving rather promptly from the evidence you have heard here. But whether it be so or not, I do not intend to tilt you one way or another in the decision you are to make.

Now, in this court, as is true generally of federal courts, the instructions are given to the jury orally in the manner that I am giving them to you now. In other words, you will not receive any booklet or pamphlet or transcript of what I am saying, and I will give them to you only just this once. Now, this of course places a heavy obligation upon me to present the instructions to you as simply and understandably as the subject matter will permit, and it places upon you the responsibility of listening closely and attentively so that you will have in mind the principles of law that are to be applied in your deliberations in the case.

In general I try to make instructions in each case as brief and concise as the subject matter will permit. Sometimes in some types of cases that is difficult to make them very brief, and in others they can be quite brief. In this particular case I should think I would classify them as medium, perhaps. However, I will say this, that the subject matter of the charge here is what [286] I am sure a layman would think of as being technical. As a matter of fact, most matters relating to tax law are rather technical in nature, and therefore, I have tried to couch what I am about to tell you, as near as may be, in lay terms, and wherever I depart from lay terms, I try and define them for you even at the risk of cover-

ing something that you already know. I hope you will not take affront if I should do that.

The instructions that are now given you must be taken as a whole and not as separate things unrelated. The whole of the charge given to you must be considered as a whole. In other words, you must not pick out some particular thing as said at one time or another and go away with it, as they say, "be carried away with that," without giving thought to all that is said, because the instructions are intended to be an integrated whole, all parts of which are to be considered in connection with all other parts.

Now, the plaintiffs in this case are Olive R. Kuney and Max J. Kuney, Sr., and Olive Kuney at the time we are here concerned with was the wife of Kuney, Sr., and the other parties plaintiff are Max Kuney, Jr., and Constance Kuney, his wife. I will not hereafter refer to either Olive or Constance particularly. They are parties by virtue of their marriage to the men involved, [287] and I think for convenience sake, if I just simply refer to either Senior or Junior, or Kuney, Sr., or Kuney, Jr., you will understand that I am then referring to both the husband and wife in each instance wherever applicable.

These plaintiffs have brought these three separate suits in which they seek a refund of income taxes previously assessed against them, and upon which assessment paid by them under protest, and they now seek to recover back these taxes, and, therefore, we refer to this kind of a case as a refund

case. The total recovery sought here is some \$83,000 odd with interest, and so on, which the plaintiffs claim they were required to pay by reason of the assessments, but which they claim was not properly due and owing them under the facts and the tax law applicable.

The suits are brought against Mr. Frank in his capacity as District Director of Internal Revenue and as a representative of the agency of the United States to whom the taxes were paid; namely, the Treasury Department of the United States.

Now, the fact that the plaintiffs on the one hand are private individuals and Mr. Frank is or was an official of the United States, in and of itself, of course, has no relevancy or bearing to the issues in the case and should not be entered into or affect your verdict [288] in any way. In other words, all persons under our law, whether they be private individuals or officials of the government, or whomsoever they may be, it does not make any difference, high, low, medium, rich or poor, under our law all are exactly equal before the law and all are entitled to equal and exact justice regardless of what their situation in life may be, and, of course, you must treat them as such in your deliberations here.

The plaintiffs having brought the action for the refund of these taxes, the burden rests upon them to establish by a preponderance of the evidence that they are entitled to refunds that they seek. Now, if you are satisfied from the evidence and under the law, as I will give it to you, that the plaintiffs have established their claim to refund by a preponder-

ance of the evidence and under the law, then, of course, they are entitled to recovery. On the other hand, if you find that they have not so established by a preponderance of the evidence their right to the refund, then, of course, they are not entitled to the refund.

The term "burden of proof" as I have just used it means the burden of producing evidence which fairly preponderates over the opposing evidence. It is not necessary that a party having the burden of proof on a particular issue in a given case should establish that [289] solely by evidence that such party himself produces or by witnesses called by such party. In determining whether or not a given party has carried the burden of proof resting on such party, you must consider all of the evidence in the case, whether it came out from witnesses called by one side or the other, whether it came out on direct or cross-examination, or however it was produced, in determining the issue.

The term "preponderance of the evidence" means the greater weight of the evidence. It is not necessarily determined by the number of witnesses who may have testified on one side or another since you may be convinced of a given fact by the testimony of a single witness as opposed to that of several witnesses, or by something coming in on cross-examination of a witness, which may satisfy you of the fact in the matter even though on direct examination the same witness or other witnesses on direct or cross testified to the contrary. What I am

trying to say here is that the preponderance of the evidence in a civil case means the excess of the weight of the value of the evidence, and it is that amount of evidence which turns the scale either one direction or another, which were evenly balanced before the introduction of the evidence.

Now, if upon a fact issue in the case you [290] find that the evidence is evenly balanced and that the scales have not been tilted one way or another, then, of course, on that fact issue you must find against the party having the burden of proof because, obviously, there has been no preponderance nor any tilt of the scales one direction or another. Then on that fact issue it must be found against the party who has the burden of establishing the fact.

Your verdict must be based entirely upon the evidence which has been presented in the course of the trial, and regardless of whether it comes out from witnesses on one side or the other, whether it came out on direct or cross-examination, and you should not discuss or consider anything but the evidence in your deliberations. The statements of attorneys in the case made during the trial either in the opening statements or in the arguments are not evidence and do not tend to prove anything that they say, and it should only be given consideration by you insofar as what you say is in accord with your judgment of what the evidence was in the first place, and what weight and significance and value you attach to it.

In general evidence is divided into two classes.

The one class is called "direct evidence" and the other we call "circumstantial evidence." [291]

Direct evidence is that given by witnesses whose testimony purports to be based upon direct, personal hearing or seeing or observation. That is direct evidence.

Circumstantial evidence means indirect proof, that is, the proof of certain facts and circumstances from which other facts and circumstances at issue in the case may reasonably and logically be inferred. In other words, it is the inferences and conclusions to be drawn from the direct evidence itself. Circumstantial evidence, of course, is not to be rejected or denied consideration merely because it is such, but it should be carefully scrutinized and considered. Under no circumstances should you indulge in guesswork or speculation or conjecture, but you are permitted to, and, indeed, it is your duty to draw such logical, reasonable and fair inferences from the direct evidence in the case as you in your judgment fairly think them entitled to receive.

You must give such weight and effect to such inferences whether in favor of the plaintiff or in favor of the defendant as you deem them entitled to receive. Circumstantial evidence in the case may be as conclusive in its convincing power as direct evidence. When it is strong and satisfactory, the jury should so consider it, neither enlarging nor belittling its force. In other words, it should have just and fair weight with you, [292] together with all the other evidence in the case.

Now, the ultimate question for your determina-

tion in this particular case is as follows: On the consideration of all facts and circumstances shown by the evidence and under the law as given you by the Court, do you find the status of Kuney, Sr., and Kuney, Jr., in their trustee capacity, separate and apart from their personal capacity, as partners in the Kuney family partnership genuine, bona fide, and valid for income tax purposes? That is the ultimate question.

The form of verdict to be given to you will be in those precise words, and you will answer that question yes or no, and that will be your general verdict in this particular case, because all issues in the case hinge upon that ultimate determination which you must make from your appraisal of the evidence that has been given to you and the law as I will state it to you now.

The general principles of law which are applicable to this question and which you must apply in reaching the answer are as follows: The tax laws of the United States provide that if an individual makes a bona fide gift of a partnership interest in a business to a member of his family or to a trust for the benefit of a member of his family, the income thereafter derived from this capital interest will be taxed to the donee, family member, or [293] trust, so long as he or it is the genuine owner of such interest.

However, if the gift is merely such in form but not such in fact, or if the donor has retained so many of the incidents of ownership that he continues to enjoy substantial ownership or control of

the property which he purports to have given away, even though the gift be valid as between the donor and donee, the interest of the donee will not be recognized for federal income purposes. In such case the donor is treated as though he were the actual owner of the partnership interest rather than the donee and the income derived therefrom is taxed to the donor rather than to the donee.

Now, I think the words "donor" and "donee" are pretty obvious what their meaning is, but simply it means that a donor is a person who makes a gift or donation, whereas, the donee is the person who receives the gift or donation.

Under our law, our federal law, a partnership itself and as such pays no income taxes. Rather, the law requires each of the partners as individuals to report and to pay taxes on his respective share of the net income of the business. The partnership as such merely files what we call an information return; that is, a return which reflects the business operations of the partnership during [294] the tax year by way of information but not as a basis for the payment of tax by the partnership as such, and consequently this type of return is commonly referred to as an "information return."

As far as we are concerned in this tax case, a partnership may be defined as an association of two or more persons who agree to share the profits of a business company which are produced by their services or by their capital used in the business. In family partnerships or trusts, there must be particularly scrutinization for tax purposes of the alloca-

tion of the income among the family members. This is because of the possibility that those who are closely related in kinship may attempt to secure tax advantages by income splitting through the operation of profitable business enterprises in partnerships or trust form although they are not actually such in substance.

The basic requirements for recognition of a partnership as bona fide for tax purposes are: (1) The existence of genuine intent on the part of the participants to actually carry on business together as partners, wherein each is the true owner of capital used in the business or furnishes services useful to the partnership business, and, (2) having such intent that they conduct the business in accordance with a genuine partnership [295] relationship.

Whether a purported trustee ownership of a capital interest in a partnership is bona fide, and whether the purported trustee-partner has actual dominion and control over such interest must be ascertained from all of the facts and circumstances shown by the evidence in each particular case. The bona fideness of the purported ownership is not shown simply by the fact that legally sufficient documents of transfer have been executed nor by any other formal or specific test.

For example, in the present case there is no issue as to the validity of either the partnership agreement or the trust document under the law of the State of Washington, but the question is whether this relationship was valid for tax purposes in the years that we are concerned with; namely, 1952,

'53, and '54. That question is a separate and distinct matter from the question of whether or no the partnership agreement and the trust agreement were validly executed.

The facts found in each particular case, when taken as a whole with respect of the several following matters, comprise the basis upon which the ultimate determination of bona fideness must rest. In other words, I will now enumerate to you a variety of the factors that are to be considered in the light of the evidence you [296] have heard in reaching your ultimate decision on the question of whether or no your answer should be yes or no to the ultimate question I have already read to you. These factors or elements, if you want to call them that, are, one, whether or not there was a retention by the donor of controls, either direct or indirect, over income distribution, assets essential to the partnership business, management powers beyond those common in ordinary partnership relationship, or restrictions on the donee in the sale or liquidation of his interest without financial detriment.

Second, whether or not there were indirect controls exercised by the donor through either a separate business organization, estates, trusts, or those of individual or family relationships or by any other means.

Third, whether or not the donee participates in the management of the business or in performance of services to the business.

Fourth, the manner of making partnership income distributions, how they were paid, how they

were determined to be paid, to whom they were paid, when and how they were used and controlled.

Fifth, the actual manner in which the partnership business was conducted after the creation of the purported trust or partnership and trustee relationship. With respect of compliance with state or local statutes concerning [297] partnership business, fictitious names, business registration, and the like.

Control of business properties, assets, bank accounts, who had them, how was it exercised, the recognition or otherwise of the donee's right in the distribution of partnership profits, and profits, the recognition of donee's interest in business contracts, insurance policies, other matters affecting the partnership business, the existence of written agreements, records, or memoranda contemporaneous with the tax years in question establishing the nature of the partnership agreement and the rights and liabilities of the several partners, the filing of tax returns as required by law, and the existence of any oral agreements with respect of the partnership business insofar as shown by the evidence.

Sixth, the reasonableness or otherwise of the salaries and other compensation paid to partners in relationship to the services rendered by them in and for the partnership business, and, finally, whether or not the business itself benefited by reason of the entrance of the new partners into the business; that is, whether or not there was a true business purpose for the formation of the partnership.

These are the factors and elements insofar as

they may be shown by the evidence and your determination [298] of the facts concerning them which may and should be taken into account in reaching your ultimate conclusion as to the bonafideness of the relationships claimed by the plaintiffs to entitle them to the refund they seek in these actions.

Now, any taxpayer, whoever he may be, has the legal right to decrease the amount of taxes he may be required to pay by any lawful means or any means permitted by the law. The fact that one of the taxpayer's motives in transacting business in a certain manner to avoid taxation, if he can, will not in and of itself establish his liability for the taxes he may have avoided, if lawfully and otherwise validly done. However, the presence or the absence of a tax avoidance motive is one of the several factors to be considered in determining the reality or the actuality or the bonafideness of the ownership of the capital interest acquired by gift and the genuineness for tax purposes of the transaction and of the partnership.

There is no rule in the law of partnership which, in and of itself and standing alone precludes a trustee of a trust from being a partner in a family partnership. Where a partnership interest acquired by gift is held in trust, the trustee may be recognized as a partner for income tax purposes if his dominion and control [299] over the interest is such that he in his fiduciary capacity as trustee is the true, actual, and genuine owner thereof. However, the validity of the trust and of the trustee as a

partner in the partnership must pass the dual standards relating to the family partnership and the trust rules.

A valid trust is an entity separate and apart from the trustor or grantor, and “grantor” or “trustor” means the same thing, the trustee and beneficiary. It is a separate, legal entity then separate and apart from the several parties who may be connected with it. The trust as such files a separate fiduciary return reporting all of the income which it has received and accrued and pays a tax on the income which it accumulates for future distribution to trust beneficiaries. In this particular, you see, a trust is different than a partnership. Trust income which is distributed fairly to the trust’s beneficiary is taxable to those beneficiaries and is deductible by the trust.

However, where the trustor or the creator of a trust has retained so many of the incidents of ownership in respect to the property transferred so as to remain, in effect, their owner, the trustor-creator for tax purposes is then treated as if he still owned the properties, and he is required to include the income from such properties [300] in his own personal tax return.

As I have just indicated, a trustee may be recognized as a partner for income tax purposes under the general principles relating to a family partnership so long as his ownership of a capital interest in the partnership is real and not merely such in form. A trustee who is unrelated to and who is in-

dependent of the grantor, and who participates as a partner and receives distribution of the income distributable to a trust will ordinarily be recognized as the legal owner of the partnership interest which he holds in trust unless the grantor has retained such controls inconsistent with such ownership and the trustee is subservient to the directions and wishes of the trustor.

If a trustee is amenable to the will of the grantor, then the provisions of the trust agreement, particularly as to whether the trustee is subject to the responsibilities of a fiduciary, the provisions of the partnership agreement and the conduct of the parties must all be taken into account in determining whether the trustee in a fiduciary capacity has become the real owner of the partnership interest or whether the trustee is subservient to the directions and wishes of the trustor who has retained substantial dominion and control over the trust and, for practical purposes, is still owner of the interest. Even [301] if a trustee is amenable to the will of the grantor, the trust may nevertheless be recognized as a partner if the trustee in his participation in the affairs of the ownership actively represents and protects the interest of the beneficiaries and does not subordinate such interest to the interest of the grantor. Moreover, if the trustee is amenable to the will of the grantor, the following factors should be given special consideration: Whether the trust is recognized as a partner in business dealing with important customers and creditors, and whether, if any amount of the partnership income is

not properly retained for the reasonable needs of the business, the trust's share of such amount is distributed to the trust annually and paid to the beneficiaries or reinvested with regard solely to the interest of the beneficiary, or, in short, how were these purported interests actually dealt with in the conduct of this family business? If they were conducted in a manner consistent with its being the trustee-partners being a true and valid partner in a business enterprise and conducting themselves as such as would normally be the case if they were truly such, the relationship is valid for tax purposes. On the other hand, if the manner in which this business was conducted was in important particulars inconsistent with a valid relationship of that kind in the normal sense, then these are factors that [302] must be taken into account by you in considering your ultimate answer to the question presented to you.

In weighing the effect of any retention of control or power upon the bona fideness of the transaction, it must be distinguished from its power or control retained for the benefit of others as contrasted to the retention of control or power for the benefit of the donor. Retentions of control for the benefit of the donee, of course, would militate in favor of the bona fideness of the relationship. Retention of controls for the benefit of the donor would militate against the bona fideness.

The basic test which you should apply in determining whether either one or the other or both of the respective trustees was subservient to the wishes

of the other as trustor is not whether either of them actually was hostile or even adverse to the actions of the other. Rather, it is whether or not each in his own right and capacity as a trustee was truly independent in thought and action and whether his actions and decisions were based on his own independent view of what action would be best for the respective beneficiaries of trusts which he administered.

Here again, isolated facts should not be considered determinative by you. Rather, your answer should be based on all the evidence and any reasonable inferences which can be drawn from the evidence. [303]

When you retire to the jury room it will be your duty to select one of your number to act as your foreman who will speak for the jury when called upon to do so, and who will sign the verdict when it has been agreed to.

The verdict must be unanimous, all twelve must agree in the verdict to be returned. No verdict can be returned without such unanimous finding by all.

We have prepared a form of verdict for you which, I am sure, you will have no difficulty in following, and which I have already, to some extent, elaborated upon, but I will read it again to you because this will now bring to your mind the final summary of what you are to decide in the case.

The verdict reads, "We, the jury, empanelled in the above-entitled cause find as below stated: On a consideration of all facts and circumstances shown by the evidence and under the law given you by the

Court, do you find the status of Kuney, Sr., and Kuney, Jr., in their trustee capacity separate and apart from their personal capacity as partners in the Kuney family partnership genuine, bona fide, and valid for income tax purposes? Answer yes or no."

If you find them bona fide and genuine and valid, you will answer yes. If you find them otherwise, you will answer no. [304]

When you have reached your conclusion about it, the foreman will fill in the word here yes or no, sign the verdict and date it, and today is the 23rd of November.

Now, you should not single out any particular thing that I have told you, but keep in mind all I have told you is to be treated and accepted as a whole as being the principles of law applicable to the case. Of course, you will have with you in the jury room all of the exhibits which have been admitted in the case, including, incidentally, a photograph of the blackboard which has been admitted in evidence. So much reference was made to it during the discussion and the examination that I thought it would be helpful to you to have this before you, and, therefore, this is a photograph of the blackboard.

Now, ladies and gentlemen, in conclusion let me remind you that it is your duty to weigh the evidence calmly and dispassionately, to regard the interest of the parties to the litigation as the interest of strangers to you, to decide the issues solely upon their merits and upon the evidence which has been given you here and the law appli-

cable thereto. You should arrive at your conclusions here without any consideration whatever of the financial ability of the parties or as to what effect, if any, it may have upon their future welfare.

You should not permit either sympathy or considerations [305] of that kind on the one hand, or prejudice or bias on the other to have any place in your deliberations. This is a question of fact. Whatever result that may be, it is your duty to state it now by returning your verdict according to the evidence and the law, which I am sure you will do.

Let the Bailiffs be sworn.

(Whereupon, the Bailiffs were duly sworn.)

The Court: Let the jury retire with the exception of the alternates.

(Whereupon, the jury retired to deliberate at 10:37 o'clock a.m.)

(Whereupon, the alternate jurors were excused.)

The Court: Do you have any exceptions to the charge, gentlemen?

Mr. Toole: If the Court please, the plaintiffs would take exception to the charge that indicated a business purpose—that the business had to be benefited by the partners, or indicated there need to be a business purpose in connection with the formation of the partnership.

The Court: That was only an element to be considered. I didn't say they needed to be. I said it was one of the elements to be considered.

Are there any exceptions, Mr. Anderson? [306]

Mr. Anderson: I have only one, your Honor, which is defendant's requested instruction No. 9, which you partially covered.

The Court: What is it about?

Mr. Anderson: It is, "Trusts and family partnerships must have substance as well as form to be recognized for tax purposes; and this is particularly true where the trust beneficiary is a minor, the trustee is a donor whose accounts need not be supervised by a judicial or otherwise independent tribunal, the purported donors acting in one capacity or another are the only partners, and there is no apparent motive or reason for creating the trust and the partnership except for tax avoidance purposes."

The Court: Very well. Exceptions are noted for the record.

(Whereupon, the court recessed subject to call.) [307]

Certificate

I, Gerald J. Popelka, official court reporter in and for the United States District Court, Western District of Washington, do hereby certify that the foregoing transcript of proceedings is a full, true, and correct transcript of proceedings had in the within-entitled and numbered cause in the above-entitled court on the date hereinbefore set forth.

I do hereby certify that the foregoing transcript of proceedings has been prepared by me or under my direction.

/s/ GERALD J. POPELKA.

[Endorsed]: Filed April 4, 1961.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Transcript of Proceedings had in the above-entitled and numbered causes in the above-entitled court before the Honorable George H. Boldt, United States District Judge, on Wednesday, March 22, 1961, at the United States Courthouse, Seattle, Washington.

* * *

The Court: As a general proposition I have found that I am never better able to decide a case to the maximum of my capabilities, humble as they are, than I am at the conclusion of the argument and after having carefully examined the memoranda and authorities that may have been submitted during the course of the trial or in connection with an argument. That has been done in this case.

Tax cases seem, for one reason or another, to be an exception to my general rule, not so much that I feel the need of delay in rendering decision, but because so often counsel request leave to submit

memoranda after argument and thus force me into the position of having to prepare a written decision at a later time. This particular case is an exception to the exception, and, therefore, for better or for worse, I intend to give you at this time my view of the questions presented by the motions for judgment notwithstanding the verdict, or, in the alternative, new trial.

Speaking extemporaneously and without notes, I do not propose to make a dissertation on all of the several points that have been raised, nor enlarge upon the detail of the evidence and facts indisputably shown and the evidence pertaining thereto. I have a clear and firm conclusion in my mind as to the ultimate decision required and will only generally indicate the basis thereof.

Under the portion of the charge to the jury reported at Pages 297 and 298 of the transcript, to which no exception was taken by either plaintiffs or defendant, the matter of bona fides in the creation of the trust in question is the matter to be determined on the over-all showing presented by the evidence on consideration of the several specific factors referred to in the instructions:

1. Retention of controls, either direct or indirect, by donor over income distributions, assets essential to partnership business, management powers, et cetera;

2. Indirect control exercised by the donor through either a separate business enterprise trust, et cetera;

3. Participation in the partnership by the donee. In this instance, of course, the trustee.

4. The manner of making partnership income distributions;

5. The actual manner in which the partnership business was conducted;

6. Control of business properties, assets, et cetera;

7. The reasonableness of salary and other compensation paid to the partners.

A further factor was included in the instruction; namely, whether or not there was a true business purpose for the formation of the partnership, but plaintiffs took exception to the inclusion of that particular element, and, therefore, it could not be considered to be a part of the law of the case. Hence I make no further reference thereto.

Conceding that in the record there is some evidence not inherently incredible which might support a fact finding favorable to plaintiffs on one or more of the factors referred to, it appears clear to me that a finding favorable to plaintiffs on the vital element pertaining to retention and exercise of control, referred to in two or three of the factors, is positively negated by the evidence, and there is no evidence whatever to support the finding favorable to plaintiffs as to those elements. A finding adverse to plaintiffs as to a factor or two of only incidental importance might not and probably would not preclude a general verdict in favor of the plaintiffs as a matter of law. On the other hand, when a basic general issue must be determined in

the light of findings on several factors of varying significance and importance, that now being established as the law of this particular case, and vital factors pertaining to the issue are negative and the Court has the clear and firm conviction that the evidence as a whole is not sufficient to sustain plaintiffs' affirmative burden of proof on that basic issue, it is the duty of the Court to set aside the verdict as not supported by substantial evidence and to grant a judgment for defendant notwithstanding the verdict.

I had such conviction at the end of the trial and when the verdict was received. Now, after a full, careful, and objective consideration of the matter, I still have the same conviction, and therefore, must hold and find that there is insufficient evidence to support judgment for the plaintiffs.

Accordingly, the verdict of the jury is set aside and notwithstanding the verdict, it is directed that judgment be entered for defendant dismissing the actions. However, if an appellate court find otherwise than as I have just stated and it be held that the evidence did present a fact issue for determination of the jury, and that there is evidence sufficient to sustain the verdict of the jury, then I am not disposed to substitute my judgment for that of the jury on that issue. Therefore, I see no reason for granting a new trial applicable in the event the judgment notwithstanding the verdict be vacated on appeal. Defendant's alternative motion for new trial is denied.

It is so ordered. Exceptions allowed.

Recess subject to call.

(Whereupon, the Court recessed subject to call.)

[Endorsed]: Filed April 4, 1961.

PLAINTIFF'S EXHIBIT No. 1

Trust Agreement

This Agreement, Made and entered into this 11th day of February, 1952, by and between Max J. Kuney, Jr., and Constance K. Kuney, husband and wife, parties of the first part, hereinafter sometimes referred to as "Grantors," and Max J. Kuney, party of the second part, hereinafter sometimes referred to as the "Trustee,"

Witnesseth:

Whereas, Max J. Kuney, Jr., is in the general contracting business, carrying on such business in partnership with others under the firm names of Max J. Kuney Company, Kuney Johnson Company, Agutter Electric Company and Tecler Aluminum Products; and

Whereas, it is the intention of the Grantors to make a gift in trust for the benefit of their minor children and others of a percentage of their interest in each of said partnership businesses; and

Whereas, it is the intention of the Grantors that the sum of such percentages so to be given by them

in trust for the benefit of their minor children and others shall equal \$100,000.00 in value.

Now, Therefore, for and in consideration of the sum of \$1.00 paid by the Trustee to the Grantors, receipt whereof is hereby acknowledged, and in further consideration of the covenants of the parties herein contained,

It is agreed that from the capital accounts of Max J. Kuney, Jr., Grantors shall forthwith cause to be placed to the credit of the Trustee, \$100,000.00 under capital accounts captioned "Max J. Kuney, Trustee" on the firm books of the businesses of Grantors, which said sum equals approximately 20 per cent of their interest in said businesses. The crediting of said amount to the account of the Trustee shall constitute the paying over, assigning, transferring and delivering to the Trustee of said sum and the receipt of the same by the Trustee.

It is further agreed that the Trustee shall hold and administer said sum and all other property that may from time to time be delivered to him, and the proceeds thereof and all increments thereof, and all property received in exchange for or purchased or acquired with the proceeds of such sum or property, or any part thereof (all of which is sometimes herein designated as the "trust estate") as Trustee for the purposes, upon the trust and subject to the terms, covenants, conditions and provisions hereafter set forth, that is to say:

Article I.

The Trustee shall divide the trust estate into two equal funds, one for the benefit of Max Jeffrey Kuney III, son of Grantors, and one for the benefit of Caroline Ireland Kuney, daughter of the Grantors. Each of said funds shall be deemed to be and shall be administered as a separate trust.

Article II.

The Trustee shall hold, manage, invest and re-invest the funds of the trust estate, shall receive the income therefrom and shall, after paying the reasonable and proper expenses of the trust, pay and distribute the principal thereof, and the income therefrom, as follows:

Section 1. The Trustee shall have the right in his sole and uncontrolled discretion to pay to Lorraine B. Kuney, mother of the Grantor, Max J. Kuney, Jr., to Clayton H. Bently, grandfather of the Grantor, Max J. Kuney, Jr., and to Mabel C. Bently, grandmother of the Grantor, Max J. Kuney, Jr., or to any of them, such portion or portions of the income of the trust estate as the Trustee may deem necessary to provide for the support, health, maintenance, welfare and enjoyment of such person or persons, due regard being given by the Trustee to the other sources of income of such persons. Any payments so made by the Trustee shall be charged equally to the two funds into which the trust estate is divided and shall be paid from the net income of said funds. The Trustee's determination as to

whether or not payments shall be made to the persons named in this section and the amount of such payments shall not be subject to judicial review.

Section 2. The Trustee shall pay the net income upon each share or fund of the trust estate remaining after any payments provided for in Section 1 of this Article to the child of Grantors for whose benefit such share or fund is set aside at quarterly or other convenient intervals.

Section 3. The Trustee shall have the right at any time, and from time to time, after a child of Grantors for whom a share or fund of the trust estate is set aside attains the age of twenty-one (21) years, to pay over, transfer, assign, convey and deliver unto such child all or any portion of the share or fund then being held for the benefit of such child, as the Trustee, in his sole and absolute discretion, deems to be for the best interest of said child. At the discretion of the Trustee such distribution may be made irrespective of whether the persons named in Section 1 of this Article shall still be living.

Section 4. Should either of Grantors' children die prior to receiving the principal of the fund set aside for the benefit of such child, leaving issue him or her surviving, then and in such event the fund for the benefit of such child so dying shall be held for the benefit of the issue of such child, and the net income therefrom shall be paid to, or, in the discretion of the Trustee, applied for the benefit of

the issue of such child in equal shares per stirpes until the youngest child of such child so dying shall have attained the age of twenty-one (21) years, or would, if living, have attained the age of twenty-one (21) years, whereupon the principal of such fund shall be paid, transferred, assigned, conveyed and delivered to the issue of such child so dying in equal shares per stirpes and not per capita.

Section 5. Should either of Grantors' said children die prior to receiving the principal of the fund for such child provided, without issue him or her surviving, or in the event of the failure of such issue prior to final distribution of such child's share or portion of the trust estate, then and in that event the fund or portion of the trust estate set aside for the benefit of such child so dying shall be added to the share or fund held for the benefit of Grantors' other child.

Section 6. In the event of the death of both of Grantors' said children prior to final distribution of the trust estate, leaving no issue them surviving, or in the event of the failure of such issue prior to final distribution of the trust estate, the Trustee shall pay over, transfer, assign, convey and deliver the trust estate then remaining in his hands to the heirs at law of the last survivor of Grantors' said children as the same shall be determined under the laws of descent and distribution of the State of Washington at the time of the death of said last survivor.

Section 7. Whenever any person under the age of thirty (30) years shall, under the provisions of this article, be entitled to receive or to have the use or application of any part of the net income of the trust estate, the Trustee may use and apply all or such part as to him shall seem best of such net income for or towards the maintenance, education, enjoyment, health and welfare of such person until such person attains the age of thirty (30) years, and the Trustee during such time as such person is under the age of twenty-one (21) years, may either so use and apply the same himself, or, in his discretion, pay the same or any part thereof to such person or to the guardian or parent of such person for the use and benefit of such person, without any responsibility for the application thereof by such guardian or parent. The amount of such net income so paid over to or used or applied for the benefit of such person under the age of thirty (30) years shall be determined by the Trustee in his sole and absolute discretion. Any part of such net income not so paid over, used or applied as aforesaid shall be accumulated by the Trustee and added to the principal of the fund or share of the trust estate then being held for such person's benefit.

Article III.

No money or property (either principal or income) payable or distributable under the provisions of this trust agreement shall be pledged, assigned, transferred, sold or in any manner anticipated,

charged or encumbered by any of the beneficiaries hereunder, or be in any manner liable in the possession of the Trustee for the debts, contracts, obligations or engagements of such beneficiaries, voluntary or involuntary, or for any claim, legal or equitable, against any beneficiary, including claims for alimony or for the support of any spouse.

Article IV.

Section 1. The Trustee shall at all times during the continuance of the trust hereby created collect all the income, issues and profits of the trust estate, and shall pay all taxes, assessments and other legal charges upon all property of the trust estate and all expenses growing out of the execution of the trust or the exercise of the powers hereby conferred, and shall pay when due all interest on all indebtedness of the trust estate, secured or unsecured, and shall have full power at all times to settle and compromise all claims or demands of or against the trust estate, and his receipt in full satisfaction of any claim of said trust estate shall be sufficient evidence of the full discharge of such claim.

Section 2. The Trustee shall have the following powers, discretion and authority:

(a) To sell, exchange or dispose of the property of the trust estate for cash or wholly or partly on credit for such price and on such terms as he shall see fit; to invest and reinvest the trust estate in such property as to him in his entire discretion shall

seem fit, including but without in any way being limited to stocks (common or preferred) bonds, notes, secured or unsecured, real or personal property and beneficial interest therein and including non-income producing property; and to change any investment from time to time without in any case being limited by any statute or rule of law regarding investments by trustees; to retain as investments any property or securities the Trustee may receive or purchase regardless of the risk therein or whether they or any portion thereof shall at any time constitute a large portion of the trust estate; to loan funds of the trust estate to any person, partnership, corporation, estate or trust with or without security; to vote (by proxy or in person) with respect to any stock or other security, to deposit any stock or other security with or under the direction of any committee or other agency formed to protect such stock or security; and otherwise to take any action he deems best with regard to reorganizations, consolidations, mergers or other changes of corporation, and to pay any expenses or assessments in connection therewith; to determine in his discretion whether to exercise or to dispose of or to reject rights to subscribe to stock or securities under pre-emptive or other rights, or to exercise options of taking dividends in cash, stock or other property; to place and keep stock, securities or other property in the custody of any depositary and in the name of the Trustee or his nominees with or without disclosing any fiduciary relationship for the purpose of making any division of the trust estate

to allot to any fund or share any property of the trust estate or an undivided interest in such property, and to make joint investments for the several funds and shares of the trust estate, and so long as it can advantageously be done, to hold all or part of the investments of the trust as a common fund and divide the net income proportionately; for the purpose of raising funds for the payment of taxes or protecting investments already held or paying, extending or renewing any indebtedness, exercising pre-emptive or other rights of stockholders, subscribing for stock or securities or for any purpose whatsoever deemed by the Trustee advantageous for the trust estate, to borrow such sums of money as he may deem expedient and to secure payment thereby by mortgage, pledge or hypothecation of any property of the trust estate; to appoint and fix compensation for and delegate authority to such attorneys, agents, servants, proxies and depositaries as he may see fit, and in the event additional trustees are appointed as hereinafter provided, to authorize one or more of the trustees to act for all of them.

(b) To lease any real estate or sublease any leasehold property on such covenants as the Trustee may deem advisable and for any term regardless of the term of the trust hereby created; to improve real estate and tear down and alter improvements; to make contracts for or in relation to foundations, party walls, building restrictions and easements; to relinquish, convey or assign any right, title or

interest in, to or about any property of the trust estate, to insure all buildings and land and income therefrom against loss by fire or other casualty, and himself as Trustee against any liability for accidents and to pay the cost of such insurance; whenever in his discretion it may be desirable to convey or cause to be conveyed any real estate to any nominee or nominees of the Trustee and with or without disclosing any trust relationship.

Section 3. In general the Trustee is given as full and complete power and authority over the trust estate as fully and to the same extent as any individual might, could or would have owning similar properties and securities in his own right.

Section 4. An entry upon the books of the Trustee allotting to any fund or share any of the assets of the trust estate, or an undivided part of any asset or group of assets not conveniently divisible shall be sufficient to effectuate such allotment without taking such assets in the name of the fund or share.

Section 5. Upon all questions as to what constitutes income of the trust estate, the decision of the Trustee shall be conclusive. The Trustee is authorized to determine in case of all investments purchased or sold at a premium or discount whether such premium or discount shall be credited to or charged against principal or income or partly against principal and partly against income. All stock dividends received by the Trustee on any

shares of stock shall be reckoned as principal provided that if the Trustee is satisfied that any such stock dividend is paid out of current earnings wholly or partly in lieu of current cash dividends, he may designate and treat such dividends or part thereof as income.

Section 6. No Trustee hereunder shall ever be held responsible for any default of any other person or for any loss sustained by the trust estate through any error of judgment or in any other manner except through his own breach of good faith. No Trustee hereunder shall ever be personally liable upon any contract of indebtedness of the trust estate or upon any mortgage, trust deed, note or other instrument executed hereunder. No Trustee hereunder shall be required to give a bond as such Trustee.

Section 7. No person paying money or delivering any property to the Trustee shall be required to see to the application thereof. The Trustee may determine the annual accounting period for the trust estate which shall be deemed the "year" of the trust estate for all purposes.

Section 8. The Trustee hereunder, his successors and substitutes, shall be and he is hereby relieved from any and all of the duties imposed upon them by Chapter 229 of the Laws of 1941 of the State of Washington, as amended. Such Trustee, his successors or substitutes, shall further be relieved from any and all duties so far as the Grant-

ors are able by this instrument to relieve him, which may in the future be imposed by amendment to said Chapter 229 of the Laws of 1941 of the State of Washington, or by any future law or laws of the State of Washington, or by any existing or future law or any other state with respect to making or filing with any court or other place any report, inventory or accounting of the principal or income of the trust hereby created.

Article V.

In the event of the death, resignation, refusal or inability of the Trustee named hereunder to act for any cause, he shall be succeeded by Max J. Kuney, Jr., one of the Grantors, as successor Trustee. While Max J. Kuney, Jr., is acting as Trustee hereunder he shall have the right at any time, and from time to time, to appoint one or more additional trustees and the right to appoint a successor trustee or trustees. In the event of the failure of Max J. Kuney, Jr., to appoint such additional or successor trustee or trustees, or in the event of the death, resignation, refusal or inability of all such trustees to act hereunder, Max J. Kuney, Jr., having for any reason ceased to act as Trustee, the Seattle First National Bank, acting by and through its Spokane & Eastern Branch, shall thereupon be and become the successor Trustee. Any additional or successor trustee or trustees shall have and exercise all the powers, authority, discretion, duties and obligations herein conferred upon and entrusted to

the Trustee. The Trustees shall serve without bond and shall be entitled to reasonable compensation.

Article VI.

The trust hereby created shall be irrevocable.

Article VII.

The party of the second part, by executing this agreement, does hereby accept the trust herein declared and created and agrees to carry out the provisions hereof on his part to be performed.

In Witness Whereof, the parties hereto have executed agreement in triplicate the day and year first above written.

/s/ MAX KUNEY, JR.,

/s/ CONSTANCE W. KUNEY,
Grantors.

/s/ MAX J. KUNEY,
Trustee.

Admitted in evidence November 21, 1960.

PLAINTIFF'S EXHIBIT No. 2

Trust Agreement

This Agreement, made and entered into this 11th day of February, 1952, by and between Max J. Kuney, party of the first part, hereinafter sometimes referred to as "Grantor," and Max J. Kuney,

Jr., party of the second part, hereinafter sometimes referred to as the "Trustee."

Witnesseth:

Whereas, Max J. Kuney is in the general contracting business, carrying on such business in partnership with others under the firm names of Max J. Kuney Company, Kuney Johnson Company, Agutter Electric Company and Tecler Aluminum Products; and

Whereas, it is the intention of the Grantor to make a gift in trust for the benefit of his minor child, John Richardson Kuney, of a percentage of his interest in each of said partnership businesses; and

Whereas, it is the intention of the Grantor that the sum of such percentages so to be given by him in trust for the benefit of his minor child shall equal \$100,000.00 in value.

Now, Therefore, for and in consideration of the sum of \$1.00 paid by the Trustee to the Grantor, receipt whereof is hereby acknowledged, and in further consideration of the covenants of the parties herein contained,

It is agreed that from the capital accounts of Max J. Kuney, Grantor shall forthwith cause to be placed to the credit of the Trustee, \$100,000.00 under capital account captioned "Max J. Kuney, Jr., Trustee" on the firm books of the businesses of Grantor, which said sum equals approximately 20

per cent of his interest in said businesses. The crediting of said amount to the account of the Trustee shall constitute the paying over, assigning, transferring and delivering to the Trustee of said sum and the receipt of the same by the Trustee.

It is further agreed that the Trustee shall hold and administer said sum and all other property that may from time to time be delivered to him, and the proceeds thereof and all increments thereof, and all property received in exchange for or purchased or acquired with the proceeds of such sum or property, or any part thereof (all of which is sometime herein designated as the "trust estate") as Trustee for the purposes, upon the trust and subject to the terms, covenants, conditions and provisions hereafter set forth, that is to say:

Article I.

The Trustee shall hold, manage, invest and reinvest the funds of the trust estate, shall receive the income therefrom, and shall, after paying the reasonable and proper expenses of the trust, pay and distribute the principal thereof, and the income therefrom, as follows:

Section 1. The Trustee shall pay Olive R. Kuney none per month toward the support and maintenance of John Richardson Kuney from January 1, 1952, during the period of time she has his actual physical custody and he is residing in her home and with her; providing if and when he is living away

from her home in school or college said payments shall continue.

Section 2. The Trustee shall pay the net income of the trust estate remaining after the payments provided for in Section 1 of this Article to John Richardson Kuney at quarterly or other convenient intervals.

Section 3. The Trustee shall have the right at any time, and from time to time, after John Richardson Kuney attains the age of twenty-one (21) years, to pay over, transfer, assign, convey and deliver unto John Richardson Kuney all or any portion of the share or fund then being held for the benefit of John Richardson Kuney as the Trustee, in his sole and absolute discretion, deems to be for the best interest of John Richardson Kuney.

Section 4. In the event of the death of John Richardson Kuney prior to his receiving all of the principal of the Trust Estate, the principal then remaining in the hands of the Trustee shall be held for the benefit of the issue of John Richardson Kuney, and the net income therefrom shall be paid to or, in the discretion of the Trustee, applied for the benefit of the issue of said John Richardson Kuney in equal shares per stirpes, until the youngest child of John Richardson Kuney shall have attained the age of twenty-one (21) years, or would, if living, have attained the age of twenty-one (21) years, whereupon the principal of the Trust Estate shall be paid over, transferred, assigned, conveyed

and delivered to the issue of John Richardson Kuney in equal shares per stirpes and not per capita.

Section 5. In the event of the death of John Richardson Kuney prior to final distribution of the Trust Estate, leaving no issue him surviving, or in the event of the failure of such issue prior to the final distribution of the Trust Estate, the Trustee shall thereafter pay the net income of the Trust Estate to the issue of Max J. Kuney, Jr., in equal shares per stirpes until the youngest child of said Max J. Kuney, Jr., shall attain the age of twenty-one (21) years or would, if living, have attained the age of twenty-one (21) years, whereupon the principal of the Trust Estate shall be paid over, transferred, assigned, conveyed and delivered to the issue of said Max J. Kuney, Jr., in equal shares per stirpes and not per capita.

Section 6. Whenever any person under the age of thirty (30) years shall, under the provisions of this article, be entitled to receive or to have the use or application of any part of the net income of the Trust Estate, the Trustee may use and apply all or such part as to him shall seem best of such net income for or towards the maintenance, education, enjoyment, health and welfare of such person until such person attains the age of thirty (30) years, and the Trustee, during such time as such person is under the age of twenty-one (21) years, may either so use and apply the same himself or, in his discretion, pay the same or any part thereof

to such person or to the guardian or parent or person having custody of such person for the use and benefit of such person, without any responsibility for the application thereof by such guardian, parent, or person having custody. The amount of such net income to be so paid over to or used or applied for the benefit of such person under the age of thirty (30) years shall be determined by the Trustee in his sole and absolute discretion. Any part of such net income not so paid over, used or applied as aforesaid shall be accumulated by the Trustee and added to the principal of the fund or share of the Trust Estate then being held for such person's benefit.

Section 7. Wherever used in this article, the terms "child," "children" and "issue" shall include persons who are adopted.

Article II.

No money or property (either principal or income) payable or distributable under the provisions of this trust agreement shall be pledged, assigned, transferred, sold, or in any manner anticipated, charged or encumbered by any of the beneficiaries hereunder, or be in any manner liable in the possession of the Trustee for the debts, contracts, obligations or engagements of such beneficiaries, voluntary or involuntary, or for any claim, legal or equitable, against any beneficiary, including claims for alimony or for the support of any spouse.

Article III.

Section 1. The Trustee shall, at all times during the continuance of the trust hereby created, collect all the income, issues and profits of the Trust Estate, and shall pay all taxes, assessments and other legal charges upon all property of the Trust Estate and all expenses growing out of the execution of the trust or the exercise of the powers hereby conferred, and shall pay when due all interest on all indebtedness of the Trust Estate, secured or unsecured, and shall have full power at all times to settle and compromise all claims or demands of or against the Trust Estate, and his receipt in full satisfaction of any claim of said Trust Estate shall be sufficient evidence of the full discharge of such claim.

Section 2. The Trustee shall have the following powers, discretion and authority:

(a) To sell, exchange or dispose of the property of the Trust Estate for cash or wholly or partly on credit for such price and on such terms as he shall see fit; to invest and reinvest the Trust Estate in such property as to him in his entire discretion shall seem fit, including but without in any way being limited to stocks (common or preferred), bonds, notes, secured or unsecured, real or personal property and beneficial interest therein and including non-income-producing property; and to change any investment from time to time without in any case being limited by any statute or rule of law regarding investments by trustees; to retain as in-

vestments any property or securities the Trustee may receive or purchase regardless of the risk therein or whether they or any portion thereof shall at any time constitute a large portion of the Trust Estate; to loan funds of the Trust Estate to any person, partnership, corporation, estate or trust with or without security; to vote (by proxy or in person) with respect to any stock or other security, to deposit any stock or other security with or under the direction of any committee or other agency formed to protect such stock or security; and otherwise to take any action he deems best with regard to reorganizations, consolidations, mergers or other changes of corporation, and to pay any expenses or assessments in connection therewith; to determine in his discretion whether to exercise or to dispose of or to reject rights to subscribe to stock or securities under pre-emptive or other rights, or to exercise options of taking dividends in cash, stock or other property; to place and keep stock, securities or other property in the custody of any depository and in the name of the Trustee or his nominees with or without disclosing any fiduciary relationship; for the purpose of making any division of the Trust Estate to allot to any fund or share any property of the Trust Estate or an undivided interest in such property, and to make joint investments for the several funds and shares of the Trust Estate, and, so long as it can advantageously be done, to hold all or part of the investments of the trust as a common fund and divide the net income proportionately; for the purpose

of raising funds for the payment of taxes or protecting investments already held or paying, extending or renewing any indebtedness, exercising pre-emptive or other rights of stockholders, subscribing for stock or securities or for any purpose whatsoever deemed by the Trustee advantageous for the Trust Estate, to borrow such sums of money as he may deem expedient and to secure payment thereby by mortgage, pledge or hypothecation of any property of the Trust Estate; to appoint and fix compensation for and delegate authority to such attorneys, agents, servants, proxies and depositaries as he may see fit, and, in the event additional trustees are appointed as hereinafter provided, to authorize one or more of the trustees to act for all of them.

(b) To lease any real estate or sublease any leasehold property on such covenants as the Trustee may deem advisable and for any term regardless of the term of the trust hereby created, to improve real estate and tear down and alter improvements; to make contracts for or in relation to foundations, party walls, building restrictions and easements; to relinquish, convey or assign any right, title or interest in, to or about any property of the Trust Estate, to insure all buildings and land and income therefrom against loss by fire or other casualty, and himself as Trustee against any liability for accidents and to pay the cost of such insurance; whenever in his discretion it may be desirable, to convey or cause to be conveyed any real estate to any

nominee or nominees of the Trustee and with or without disclosing any trust relationship.

Section 3. In general the Trustee is given as full and complete power and authority over the Trust Estate as fully and to the same extent as any individual might, could or would have owning similar properties and securities in his own right.

Section 4. An entry upon the books of the Trustee allotting to any fund or share any of the assets of the Trust Estate, or an undivided part of any asset or group of assets not conveniently divisible, shall be sufficient to effectuate such allotment without taking such assets in the name of the fund or share.

Section 5. Upon all questions as to what constitutes income of the Trust Estate, the decision of the Trustee shall be conclusive. The Trustee is authorized to determine in case of all investments purchased or sold at a premium or discount whether such premium or discount shall be credited to or charged against principal or income or partly against principal and partly against income. All stock dividends received by the Trustee on any shares of stock shall be reckoned as principal provided that, if the Trustee is satisfied that any such stock dividend is paid out of current earnings wholly or partly in lieu of current cash dividends, he may designate and treat such dividends or part thereof as income.

Section 6. No Trustee hereunder shall ever be

held responsible for any default of any other person or for any loss sustained by the Trust Estate through any error of judgment or in any other manner except through his own breach of good faith. No Trustee hereunder shall ever be personally liable upon any contract of indebtedness of the Trust Estate or upon any mortgage, trust deed, note or other instrument executed hereunder. No Trustee hereunder shall be required to give a bond as such Trustee.

Section 7. No person paying money or delivering any property to the Trustee shall be required to see to the application thereof. The Trustee may determine the annual accounting period for the Trust Estate which shall be deemed the "year" of the Trust Estate for all purposes.

Section 8. The Trustee hereunder, his successors and substitutes, shall be and he is hereby relieved from any and all of the duties imposed upon them by Chapter 229 of the Laws of the State of Washington, as amended. Such Trustee, his successors or substitutes, shall further be relieved from any and all duties so far as the Grantors are able by this instrument to relieve him, which may in the future be imposed by amendment to said Chapter 229 of the Laws of 1941 of the State of Washington, or by any future law or laws of the State of Washington, or by any existing or future law of any other state with respect to making or filing with any court or other place any report, inventory or accounting of the principal or income of the trust hereby created.

Article IV.

In the event of the death, resignation, refusal or inability of the Trustee named hereunder to act for any cause, he shall be succeeded by Max J. Kuney, Grantor, as successor Trustee. While Max J. Kuney is acting as Trustee hereunder he shall have the right at any time, and from time to time, to appoint one or more additional trustees and the right to appoint a successor trustee or trustees. In the event of the failure of Max J. Kuney to appoint such additional or successor trustee or trustees, or in the event of the death, resignation, refusal or inability of all such trustees to act hereunder, Max J. Kuney having for any reason ceased to act as Trustee, the Seattle First National Bank, acting by and through its Spokane & Eastern Branch, shall thereupon be and become the successor Trustee. Any additional or successor trustee or trustees shall have and exercise all the powers, authority, discretion, duties and obligations herein conferred upon and entrusted to the Trustee. The Trustees shall serve without bond and shall be entitled to reasonable compensation.

Article V.

The trust hereby created shall be irrevocable.

Article VI.

The party of the second part, by executing this agreement, does hereby accept the trust herein declared and created, and agrees to carry out the provisions hereof on his part to be performed.

In Witness Whereof the parties have executed this agreement in triplicate the day and year first above written.

/s/ MAX J. KUNEY,
Grantor,

/s/ MAX J. KUNEY, JR.,
Trustee.

Admitted in evidence November 21, 1960.

[Title of District Court and Cause.]

Civil Nos. 4990, 4991, and 4992

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO RECORDS ON APPEAL.

United States of America,
Western District of Washington—ss.

I, Harold W. Anderson, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) FRCP, and designation of counsel, I am transmitting herewith the following original documents in the files of the above-referred-to cases dealing with the actions as the records on appeal herein to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers being identified as follows:

Cause No. 4990

1. Complaint filed Feb. 4, 1960, with exhibits A, B, C, D and E attached.

4. Answer, filed Apr. 4, 1960.

10. Pre-Trial Order, filed Nov. 7, 1960.

7. Defendant's Motion for Summary Judgment, filed July 5, 1960, with copies of trust agreements attached.

8-b. Affidavit of Max J. Kuney in Opposition to Defendant's Motion for Summary Judgment, filed July 22, 1960.

8-c. Affidavit of Max J. Kuney, Jr., in Opposition to Defendant's Motion for Summary Judgment, filed July 22, 1960.

9. Memorandum Decision on motion for summary judgment, filed Aug. 10, 1960.

17. Motion Defendant for Directed Verdict, filed Nov. 22, 1960.

18. Renewal of Defendant's Motion for a Directed Verdict, filed Nov. 22, 1960.

19. Verdict, filed Nov. 23, 1960.

21. Defendants' Motion for Judgment NOV or for New Trial, filed Nov. 25, 1960.

29. Judgment Notwithstanding the Verdict of the Jury, filed Apr. 24, 1961.

30. Notice of Appeal, filed May 19, 1961.

31. Bond for Costs on Appeal, filed May 19, 1961.

27. Court Reporter's Transcript of Proceedings commencing Nov. 21, 1960, filed Apr. 4, 1961.

28. Court Reporter's Transcript of Proceedings commencing March 22, 1961, filed Apr. 4, 1961.

34. Order Extending Time for Filing Record on Appeal and Docketing Appeal, to Aug. 17, 1961, filed Jun. 27, 1961.

35. Designation of Record on Appeal, filed Aug. 3, 1961.

Cause No. 4991

1. Complaint, filed Feb. 4, 1960, with Exhibits A, B, C, D and E attached.

4. Answer, filed Apr. 4, 1960.

5. Notice of Appeal, filed May 19, 1961.

6. Cost Bond on Appeal, filed May 19, 1961.

(Note: Other documents designated are included in the record in Cause No. 4990.)

Cause No. 4992

1. Complaint, filed Feb. 4, 1960, with exhibits A, B, C, and D attached.

4. Answer, filed Apr. 4, 1960.

5. Notice of Appeal, filed May 19, 1961.

6. Cost Bond on Appeal, filed May 19, 1961.

(Note: Other documents designated are included in the record in Cause No. 4990.)

Plaintiffs' Exhibits numbered 1 through 35;
Defendant's Exhibits lettered A through R inclusive;

Court Exhibits numbered 1 and 2.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the

appellants for preparation of the records on appeal in these causes, to wit:

Filing fee, Notice of Appeal, \$5.00 in each of causes numbered 4990, 4991 and 4992, and that said amount has been paid to me on behalf of appellants.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 7th day of August, 1961.

[Seal] HAROLD W. ANDERSON,
Clerk.

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 17507-8-9 United States Court of Appeals for the Ninth Circuit. Max Kuney, Jr., and Constance K. Kuney, his wife; Max J. Kuney, Sr., Olive R. Kuney, Appellants, vs. William E. Frank, District Director of Internal Revenue, Appellee. Transcript of Record. Appeals from the United States District Court for the Western District of Washington, Northern Division.

Filed August 14, 1961.

Docketed August 16, 1961.

FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 17507, No. 17508, No. 17509

MAX J. KUNEY, JR., and CONSTANCE K.
KUNEY, His Wife; MAX J. KUNEY, SR.,
OLIVE R. KUNEY,

Appellants,

vs.

WILLIAM E. FRANK, District Director of Inter-
nal Revenue,

Appellee.

STATEMENT OF POINTS TO BE RELIED
UPON BY THE APPELLANTS

Come Now Max J. Kuney, Jr. and Constance K. Kuney, his wife, Max J. Kuney, Sr., and Olive R. Kuney, by their attorneys, Warren V. Clodfelter and Allen A. Bowden, and pursuant to Rule 17 of the Rules of the United States Court of Appeals for the Ninth Circuit, hereby make the following statement of points relied upon by the appellants:

1. The District Court erred in overruling the verdicts of the jury that the trusts for the benefit of John R. Kuney, Max J. Kuney, III and Caroline I. Kuney, were genuine, bona fide and valid partners in the Kuney family partnership for income tax purposes.

Dated this 23rd day of August, 1961.

/s/ ALLEN A. BOWDEN,

/s/ WARREN V. CLODFELTER,

Attorneys for the Appellants.

Affidavit of service by mail attached.

[Endorsed]: Filed August 24, 1961.

[Title of Court of Appeals and Cause.]

Nos. 17507, 17508 and 17509

STIPULATION RE EXHIBITS

It is hereby stipulated, subject to the approval of the Court, that all exhibits admitted into evidence and not specifically designated for printing may be referred to by counsel in their respective briefs and in oral argument and considered by the Court with the same force and effect as if included in the printed record.

Dated: September 7, 1961.

/s/ ALLEN A. BOWDEN,
Counsel for Appellants.

/s/ JOHN B. JONES, JR.,
Acting Assistant Attorney General, Counsel for
Appellee.

So Ordered:

/s/ STANLEY N. BARNES,
Judge, U. S. Court of Ap-
peals for the Ninth Circuit.

[Endorsed]: Filed September 7, 1961.





